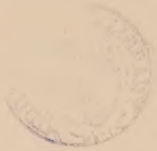
Digitized by the Internet Archive
in 2026

https://archive.org/details/doctrinepractice0000geor

B254 GOL
Q 10077



MIDDLE
WITHDRAWN STOCK

KN 366 GOL

12 — 2.

THE

123/51

DOCTRINE AND PRACTICE OF EQUITY;

OR,

A CONCISE OUTLINE OF PROCEEDINGS

IN THE

High Court of Chancery.

DESIGNED PRINCIPALLY FOR THE USE OF STUDENTS.

BY

GEORGE GOLDSMITH, A.M.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

SIXTH EDITION.

Ἐπανόρθωμα (ἡ Ἐπιείκεια) τοῦ νομίμου δικαίου.

ARIST. 5 Ethic. 14.

LONDON:

BUTTERWORTHS, 7, FLEET STREET,

Law Publishers to the Queen's most excellent Majesty.

DUBLIN: HODGES, FOSTER & CO. EDINBURGH: T. & T. CLARK; BELL & BRADFUTE.
CALCUTTA: THACKER, SPINK & CO. BOMBAY: THACKER, VINING & CO.
MELBOURNE: GEORGE ROBERTSON.

1871.

LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, W.C.

PREFACE

TO THE FIRST AND SUBSEQUENT EDITIONS.

In presenting the following pages to the public, the author conceives that no just offence can be taken for his having attempted to add one more stepping-stone to those already placed in the path of the inexperienced but inquiring student, for the purpose of facilitating his ascent to the more extensive and abstruse researches in that department of the profession which forms the consideration of this little work. The want, which is so frequently lamented at the commencement of this part of the Law Student's labours, of some epitomized publication, wherein the leading doctrines and practice of Equity are so concentrated as to give at one view the whole scope of the subject, often induces him to sketch out for himself a plan of every work of authority to which he may have recourse during the progress of his studies; but, as these books principally relate to one single branch or other of equity, without combining in

them the entire system of equitable jurisprudence, they appear, notwithstanding their great and intrinsic merit, too voluminous and mighty for the memory of a mere tyro, who is seeking to condense, by some analytical contrivance, the principles and practice of the court, before he enters at large upon the more profound and scientific study of his profession. The reason of the inadequacy of such works to meet the immediate exigencies of the student is obvious,—that they are written for the direction and information of the skilful and apt practitioner or learned advocate, rather than the uninstructed pupil; and thus the latter, without possessing any clear notions of even the rudiments of the subject, is at once brought into contact with all the niceties and subtle reasonings of the practised mind, addressing itself to minds equally matured.

The object of these few pages is, therefore, to give the student such a general survey or outline of the courts of equity, as to enable him so to acquaint himself with the subject, that he may not feel his energies damped when called upon to engage with the more abstruse and minute researches into their separate and distinct branches. Nothing can be more disheartening to the uninitiated in any science than to be confined to the dry task of becoming acquainted with one particular and isolated portion of it, previously to his being furnished with its general principles, and the relative bearing which one part has to another. It is surely time enough to obtain a knowledge of the various cities or towns of any particular country, after one has become

acquainted with the four quarters of the globe, that quarter in which the identical country is situated, and the position which the latter holds with respect to neighbouring nations. Every student feels anxious to possess a general sketch of his study, before he sits down to grapple with its parts in detail—to have, in fact, so comprehensive a notion of the whole matter, as to be able to answer any fair and general question relating thereto, whenever necessity or occasion may require. It is for such purpose that the author has presumed to address this little work to the rising members of the profession, in the anticipation that it will not only assist them in their inquiries prior to being admitted into fellowship with the acknowledged members of the law, but will also prove a kind of *vade mecum* whilst engaged in the active duties of their calling.

It must however be distinctly understood, that these suggestions are by no means intended to supersede all further inquiry into the subject of which they profess to treat,—the main object of the author being rather to facilitate and clear the way for more extensive examination; in other words, to afford the student such a knowledge of the equitable jurisdiction, as will induce him to follow out the points, many of which are but slightly hinted at, and thereby enable him, by an easier course, to arrive at a fair and creditable position among the numerous members of the legal profession.

And, since to the practised lawyer, or experienced solicitor, all works of an elementary character can offer but very few attractions, the following is therefore chiefly

presented to those who are anxiously preparing themselves previous to their taking a part in the more onerous and responsible duties which they will ultimately be called upon to fulfil.

53, Chancery Lane,
September, 1871.

CONTENTS.

PAGE

PREFACE iii

INTRODUCTION.—Officers of the Court of Chancery—Lord Chancellor—Judges formerly in Chancery—Lord Keeper—Chancellor in Saxon times—Bocara or Secretary—Ecclesiastic—Antiquity of Chancellor's Office—Lords Justices— Master of the Rolls—His Rank and Jurisdiction—Vice-Chancellors—Former Office of Masters in Ordinary—Abolition of their Office by Acts of Parliament, 15 & 16 Vict. c. 80—Judges in Chambers and their Chief Clerks—Commissioners to administer Oaths—The Accountant-General—The Governor and Company of the Bank of England, 23 & 24 Vict. c. 38, ss. 10, 11—Registrars—Examiners—Office of Six Clerks abolished—Clerk of Enrolments—Taxing Masters—Solicitors—Masters in Lunacy—Conveyancing Counsel—Scientific Persons—Clerks to the Judges—New Orders xiii

PART I.

CHAPTER I.

Historical Outline of the Court of Chancery—Reports—Reporters 1

CHAPTER II.

General Observations on Equity 59

CHAPTER III.

The various Branches of the Court of Chancery—1. The Common Law Jurisdiction—2. The Statutory Jurisdiction—3. The Specially Delegated Jurisdiction—4. The Equity Jurisdiction 74

PART II.

THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY.

CHAPTER I.

PAGE

Accident and Mistake—Lost Deed—Penalty—"Once a Mortgage always a Mortgage"—Redemption—Penalty in a Bond—Ecclesiastical Notions as to Interest upon Loans—Penalty of Bond—Mistake in written Contracts—Mistake in a Conveyance—Election, Doctrine of—Defective Surrender of Copyhold—Marriage Settlements—Marriage Articles—Wills—Trust executed,—executory—Creditor and Volunteer—*Ignorantia Juris non excusat* 87

CHAPTER II.

Account—Concurrent Jurisdiction at Law and Equity—Between Tradesman and Customer—Factor and Principal—Heir at Law—Joint Debts, Rents and Profits—Partnership Transactions—Co-Obligors—Co-Sureties—Contribution—Against Auditors, etc. 106

CHAPTER III.

Fraud—Object of Court—1st. To prevent Fraud in regard to Trustee for Sale—Auctioneer—Solicitor and Client—Medical Man and Patient—Clergyman and Penitent—Guardian and Ward—Expectant Heirs—WASTE—Restrained by means of Injunction 118

2. To redress Fraud 171

CHAPTER IV.

Infants—Guardianship—Maintenance—Marriage 192

CHAPTER V.

Married Women—Common Law Rights of Husband as to her Property—Separate Use—Restraint on Alienation—20 & 21 Vict. c. 85 and 21 & 22 Vict. c. 108—Equity to a Settlement—Stat. 33 & 34 Vict. c. 93 209

CHAPTER VI.

PAGE

Specific Performance—Penalty for Non-performance—Not enforced where contrary to Public Policy—Nor where Maintenance and Champerty are involved—*Nudum Pactum*—Specialty and Parol Agreements—Statute of Frauds—Part Performance—Part Performance of Parol Agreement—Maxim "He who seeks Equity must do Equity"—Bill for Specific Performance to refer Matters to Arbitration—Sale of an Attorney's Business—Gross Laches—Mutuality of Remedy necessary to Specific Performance—Principle upon which Specific Performance of Agreements is enforced—Conversion—7 Will. IV. & 1 Vict. c. 26—3 & 4 Will. IV. c. 74, s. 70—Ibid. s. 40—1 & 2 Vict. c. 110, s. 11—27 & 28 Vict. c. 112, s. 3—Mortmain Act, 9 Geo. 2, c. 36—Reasons for passing it—Stringency of Laws against—*Circuity* and *Election* guarded against in Cases of Mortmain—Statute of Mortmain founded upon Principles entirely Political—Divers recent Acts passed upon the Subject of Mortmain 220

CHAPTER VII.

Trusts—Uses—*Fidei-Commissum*—Statute of Uses—Conscience—Definition of Trust express or implied—By Construction—Executor Trustee—11 Geo. IV. & 1 Will. IV. c. 60—Trustee Relief Acts—Act for further Relief of Trustees—Trustee Act Extension, 22 & 23 Vict. c. 35 (Lord St. Leonards' Act) .. 254

PART III.

CHAPTER I.

By and against whom a Suit may be instituted—The Crown—Married Woman—Infant—Idiot—Bodies Politic and Corporate 289

CHAPTER II.

Of the Bill—Receiver—Writ of *Ne exeat Regno* 297

CHAPTER III.

PAGE

Parties to a Suit—Against an acting Executor's Representative and surviving Executor—Attorney-General—Personal Representative—Obligee of a Bond—Assignee of Copyright—Privity of Interest—The Certificated Bankrupt—Acceptor—Scheduled Creditors—Heir-at-Law and Devisee of Obligor—Real and Personal Representative of Purchaser—Trust of a Will—Lord of a Manor—Bill of Foreclosure—Judgment Creditors—Those who may, those who must be Parties—Heir of Mortgagee Trustee for Executor—Large Bodies in the nature of Partnership—Officers of a Public Company—One Creditor on behalf, etc.—One Creditor only—Partners—Adventurers—Joint Stock Companies—Members of a Company very numerous—No Parties generally beyond Tenant in Tail—Devisees—Parties out of the Jurisdiction—*Cestui que Trust*—Decree against one taking the first Estate of Inheritance, 15 & 16 Vict. c. 86, s. 42, and Rules—Creditor may obtain an Order for Administration of the Real Estate—Foreclosure—Misjoinder 307

CHAPTER IV.

Of the several Kinds of Bills—Original—Not original—Bills in the nature of original Bills 343

CHAPTER V.

Filing Bill—*Lis pendens*—Summons to Defendant—Old Form of Proceeding by Subpœna—New Form by Service of Printed Copy of Bill 355

CHAPTER VI.

Service of Bill—Substituted Service—Consolidated Orders—Affidavit of Service—No Attachment, or Serjeant-at-Arms to compel Appearance—Contempt of Court—Formal Parties .. 362

CHAPTER VII.

To compel Appearance of Peers and Members of Parliament—Of a *Feme Covert*—Of an Infant—Of a Person of unsound Mind—And of a Corporation 371

CHAPTER VIII.

PAGE
The Defence—Time generally 375

CHAPTER IX.

Answer—Process to enforce—Orders 8th May, 1845, and Consolidated Orders in taking the Bill *pro confesso* 379

CHAPTER X.

Various Modes of Defence—Demurrer—Plea—Answer—Disclaimer 390

CHAPTER XI.

Exceptions to Answer—When Answer is deemed sufficient .. 437

CHAPTER XII.

Amendment of Plaintiff's Bill—Time allowed to amend—Dismissing a Bill for want of Prosecution.. 443

CHAPTER XIII.

Hearing—Bill and Answer—Replication—Motion for Decree .. 450

CHAPTER XIV.

Evidence 455

CHAPTER XV.

Times, etc.—Evidence on Motion for Decree—Replication—New Orders—Production of Witness for Cross-Examination .. 490

CHAPTER XVI.

Setting the Cause down for Hearing—Subpœna to hear Judgment—Hearing the Cause—Decree Nisi and Final 496

CHAPTER XVII.

Minutes of the Decree—Re-hearing—Petition of Appeal—Caveat against the Decree—Bill of Review 508

CHAPTER XVIII.

PAGE

Issue at Law and Reference to Chambers under an Interlocutory Decree—Proceedings in Chambers—Chief Clerk's Certificate—Directions—Further Directions—Final Decree 517

CHAPTER XIX.

Production of Documents 572

CHAPTER XX.

Motions and Petitions 578

CHAPTER XXI.

Suing and defending in Formâ Pauperis—Costs—Conclusion .. 588

INDEX 611

INTRODUCTION.

Before directing the student's attention to that which is to form the subject of the present little work, it may be necessary to take a short survey of the principal officers of the High Court of Chancery, and their respective duties; and for this purpose we must first observe, as we shall hereafter more fully have occasion to explain, that the Court of Chancery consists of two jurisdictions; the one called the Ordinary, and the other the Extraordinary Jurisdiction. In the former (which is also denominated the Petty Bag side) the proceedings are conducted according to the common and statute law; in the latter they are regulated according to the rules and maxims of equity. Our inquiry will relate principally to the Equity side of the court, or, in other words, its Extraordinary Jurisdiction.

There were formerly but three judges belonging to the Court of Chancery, each however sitting to administer justice in his own proper court. The chief of these was the Lord Chancellor, who was moreover the Judge of Appeal, next to him the Master of the Rolls, and lastly the Vice-Chancellor. But, by reason of the great arrear of suits in these courts, it was found expedient to add two other judges in Chancery. This desirable object was effected towards the latter end of the year 1841, and accordingly two new Vice-Chancellors were appointed, and two separate courts erected, over which they severally preside.

The LORD CHANCELLOR* is the highest judicial officer in the realm, and is styled the Lord High Chancellor of Great Britain. He is invested with the office by delivery to him of the great seal by the sovereign, and by taking his oath. He is one of the Privy Council by his office, and prolocutor of the House of Lords by prescription. He takes precedence of all temporal peers, and is patron of the king's livings under a certain value. From his having the custody of the great seal he is frequently called in the older reports the *Lord Keeper;* and, according to the testimony of an author who wrote in the reign of Henry II., when the archbishops were usually chancellors, the chancellor was the second person of the realm and next to the king: with one side of the king's seal, of which he had the custody, he had the power to sign his own injunctions and dispose and order the king's chapel as he pleased. He was to receive and keep all archbishoprics, abbeys, and baronies, void and falling into the king's hands; to be present at all coronations, and thither to repair uncalled; and that all things be directed and disposed of by the advice of the lord chancellor (*a*).†

* Mr. Justice Blackstone, who usually waxes warm at the bare mention of the Pope and the Roman Church, endeavours to show that we are indebted to the pride of the latter for our highest judicial functionary. He first derives the office and name of chancellor from the courts of the Roman emperors, where it signified a scribe or secretary, who became afterwards invested with certain judicial powers and superintendency over the rest of the officers of the prince, and then states, that from the Roman Empire it passed to the Roman Church, ever emulous of imperial state; and hence, every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities. Being formerly usually an ecclesiastic, and presiding over the royal chapel, he became keeper of the king's conscience (B. iii. 47).

(*a*) Choice Cases in Chancery, Introd. 59.

† He was, as stated in the text, frequently called the lord keeper in former times, although it does not follow, as of course, that the Lord

His office is determinable at the monarch's pleasure, or the re-delivery of the great seal.

Chancellor and Lord Keeper should have been one and the same person, at any rate during the history of the Court prior to the reign of Queen Elizabeth; for it was declared, by a statute passed in the fifth year of her reign, chap. 18, that the authority of the Lord Keeper and the Lord Chancellor of England should be but one. It has been said, however, that there was a marked distinction between them both before and after that statute; and that several instances have occurred of there having been a lord chancellor and a lord keeper of the great seal exercising their respective offices at the same time. *Vide* "Kennedy's Code of Practice in Chancery," p. 22 *n*.

Lord Ellesmere thinks the first sole keeper of the great seal to have been Simon the Norman, in the 23rd Henry III., of which however he was shortly after deprived, when he was banished the court for refusing to seal the patent whereby Thomas, Earl of Flanders, might demand fourpence for every sack of wool that went out of England into Flanders.* He states, also, that sometimes the chancellor of England had a keeper of the seal subscribed to him. Thus there was Ranulph the Chancellor, and Richard the Chaplain, keepers of the great seal to Henry I., both at the same time. Sometimes there were two keepers of the great seal contemporaneously, as in the instance of Jeffrey le Templer and John de Lexington, notwithstanding Ralph Neville remained chancellor.

"Sometimes," adds his Lordship, "the great seal was delivered unto three at once, as by Edward II. to William Melton and two others joined with him, for a certain time to execute all such things as were to be done therewith during the king's pleasure.

"The election or creation of chancellors and keepers, etc. was of more than divers degrees and qualities. Sometimes, and for the most part, the chancellor was elected by the king, *durante bene placito*, and put into office by the delivery of the seal; and sometimes the chancellor was made by patent, to hold the place or office during his life, as Walter Gray, Bishop of Chester, in the time of King John, and others; some, and the most part, were elected by the king only; some had patents of the king, and were confirmed chancellors by consent of the three estates, as was Ralph Neville, Bishop of Chester, in the time of Henry III."—Observations on the Office of Chancellor, pp. 14, 15.

---

* Simon le Norman seems at any rate to have held the great seal for a period of about seven years, viz., from A.D. 1235 to 1242.

Although there may be traced but a slight degree of similarity between the office of chancellor as it existed in the early days of Saxon dynasty, and the importance which it assumed in after-times,—yet, when we also consider the moderate degree of dignity and power attached to the sovereigns at that period of our history,—we shall not discover a greater disproportion between the king and his chancellor, or bocara, or secretary, or by whatever name he was called, than between the sovereign and the chancellor in more modern times. Until the reign of Edgar, a Saxon king was little better in degree that a superior among chieftains, and, at best, but the sovereign of a small territory; whilst the chancellor was generally an ecclesiastic, chosen from a body of men who, in the midst of a nation of unlettered warriors, were the sole depositories of all literature, both ancient and modern. Hence their services were essential in all transactions throughout the country, whenever a deed or any other formal document was to be drawn and executed; and, bearing in mind their acquaintance with the laws as well as the literature of ancient nations, especially the Roman civil and canon law, we can well conceive the influence which they exercised among our brave but illiterate ancestors. That this was the chief employment of the secular clergy, namely, the drawing of grants, gifts, conveyances, etc., in the common transactions arising among the laity, is obvious to any one who takes a retrospect of those times (*b*); and, even for some considerable period after the Conquest, the office of chancellor continued to be much of the same character and importance as before that era; namely, the making out of the royal precepts and charters, although, in subsequent times, he gradually rose to the highest degree of secular dignity. In the reign of William Rufus, the chancellor subscribed his name rather by virtue of his ecclesiastical order

(*b*) Palgr. Rise, p. 204.

than on account of his office as such. He signed as chief among the royal chaplains, having the custody of the documents that were kept in the king's chapel, and also the care of the royal seal.*

Lord Ellesmere, in his "Observations on the Court of Chancery," enters into a learned account of the office of chancellor, which he traces up to Jehoshaphat, the son of Ahilud, among the Hebrews.

The 60th section of the 15 & 16 Vict. c. 80, provides that the lord chancellor may, within six weeks after he has delivered up the great seal, give to the registrar of the Court of Chancery a written judgment signed by him in any case heard by him and standing for judgment, and thereupon a decree or order is to be drawn up.

Whenever a vacancy occurs in the chancellorship, the duties of that office are discharged by commissioners appointed by the crown, and the seal is then said to be in commission. The custody of the great seal is entrusted to the chief of the persons thus constituted by the crown, who are styled the "Lords Commissioners of the Great Seal."

Lords Justices.—By virtue of the 14 & 15 Vict. c. 83, two new judges of appeal were created, who together with the lord chancellor form the Court of Appeal in Chancery (sect. 1), and the jurisdiction possessed by the lord chancellor in the Court of Chancery at the time limited for the 14 & 15 Vict. c. 83 to come into operation, viz. 1st October, 1851, and all powers, authorities, and duties, as well ministerial as judicial, incident to such jurisdiction then performed by the lord chancellor and the statutory jurisdiction exer-

* "Chartam istam (Gulielmi Secundi) dignam esse, quæ hic locum habeat existimo propter varias rationes:—Primo, quod tum, more *Anglo-Saxonico*, cum crucis signis, tum Anglo-Normanico, cum sigillo regis, corroboratur. Secundo, quod tot tempore æqualium virorum præsertim ecclesiasticorum qui magni nominis fuerunt, illustris videtur."—Hickes' Disser. 46.

cised by the lord chancellor acting judicially in the Court of Chancery, may be performed by the Court of Appeal (*ib.*, sects. 5 and 6). The jurisdiction possessed by the vice-chancellors in bankruptcy was by the said act to be exercised by the court of appeal (sect. 7). The power of the court of appeal may be exercised either by the lord chancellor alone or by one only of the lords justices and the lord chancellor, sitting together as such court of appeal, or by both the lords justices sitting as such court, apart from the lord chancellor (sect. 11) (*c*).

These judges are styled "lords justices of appeal in Chancery," and take rank and precedence next after the lord chief baron of the Exchequer, and as between themselves according to the order and time of their appointment (sect. 3).

The decisions of the majority of the judges of the court of appeal shall be taken and deemed to be the decision of the court: and if the judges of the court be equally divided in opinion on any cause or matter brought before the court by way of appeal, the decree or order appealed from shall be taken and deemed to be affirmed by the court of appeal (sect. 9).

The lord chancellor may authorize one of the lords justices to sit in lieu of the master of the rolls or one of the vice-chancellors in case of their illness or absence (sect. 14).

The lords justices are by virtue of the Queen's sign-manual entrusted with the persons and estates of idiots, lunatics, and persons of unsound mind; and all the functions of the lord chancellor under the Queen's sign-manual, with respect to the persons and estates of the above class of individuals, may

(*c*) See also 30 & 31 Vict. c. 64, and 31 & 32 Vict. c. 11, conferring powers on the lords justices to sit separately, except for the purpose of rehearing causes or motions for a decree or decretal order, and also 30 & 31 Vict. c. 87, giving them power to sit separately in lunacy. A decretal order is an order made merely directing inquiries, &c., but not in any way deciding any of the merits.

be exercised by the lords justices for the time being entrusted as aforesaid (sect. 15).

The Master of the Rolls is appointed by the crown by patent, and may hold his office for life. The exercise of his judicial authority is to be traced from the reign of Edward I. (*d*). He exercises a distinct jurisdiction in a separate court called the Rolls. He ranks next after the lord chief justice of the Queen's Bench, and is thus the third judicial character in the state. His jurisdiction extends to the hearing and determining originally all matters cognizable in the chancellor's court, except cases in lunacy and bankruptcy (*e*). The master of the rolls has the custody of the records of Chancery, and is chief clerk of the Petty Bag office.*

Formerly, everything that was presented to the master of the rolls for his decision (excepting the hearing of causes) was brought before him by petition. But now (*f*) he is empowered to hear and determine all such motions, pleas, or demurrers, arising in or filed in causes depending in the High Court of Chancery, as shall be duly set down for hearing before him.

The decrees of the master of the rolls must be signed by the chancellor, previously to their being enrolled.

The Vice-Chancellor is appointed by the crown under letters patent. The office of vice-chancellor, as it now exists, is comparatively of modern date, having been created by the statute 53 Geo. III. c. 24, and is held during good

(*d*) Spence, Eq. Juris. 358.

(*e*) 3 Geo. II. c. 30.

* His title in the patent is *clericus parvæ bagæ, custos rotulorum, et custos domus conversorum*, so called, because the Jews, anciently, as they became converted to Christianity, were sent into that house apart from the rest of the Jewish nation in London. The same house, with its appurtenances, was appropriated by Edward III. to the preserving of the rolls-records of the Chancery. Hence it is denominated *The Rolls*.—Camden, 428. Choice Cases in Chancery, Introd. 71.

(*f*) 3 & 4 Will. IV. c. 94.

behaviour. The title, however, as well also as the functions of vice-chancellor, is of considerable antiquity, and frequently mentioned by our earlier writers, and appears to have been known in the time of Henry II. and Richard I., and even at a more remote period of our history,* although the office had for ages fallen into disuse. The duties of the vice-chancellor are to hear and determine all causes, matters and things depending in the Court of Chancery, either as a court of law, or as a court of equity, or as incident to any ministerial office of the said court, or which have been, or shall be submitted to the jurisdiction of such court. His office is ancillary to that of the chancellor; for he was, by the provisions of the above statute, to sit for his lordship in his absence, or whenever he was by him called upon to do so, or in a separate court, whether the chancellor were sitting or not. He ranked next in precedence to the master of the rolls. By 5 Vict. c. 5, s. 19, two additional vice-chancellors were appointed to assist in the discharge of the judicial functions of the lord chancellor. Their duties are similar to those given by the above-mentioned Act, 53 Geo. III. to the vice-chancellor. There are therefore at present three vice-chancellors.

Masters in Ordinary in Chancery consisted of twelve in number, at the head of whom was the master of the rolls;†

* "Although there may be perceived some small difference between a keeper of the great seal and a vice-chancellor; for of vice-chancellors also I find two sorts, the one exercising the office of a chancellor in matters of justice, and such an one was *Malus Catulus*, in the time of King Richard I. Another was the chief secretary, as it seemed, unto the chancellor, to write the patent of the prince; and such an one was *Sywardus*, whose name I have seen subscribed to a charter of Edward the Confessor: '*Ego Sywardus Notorius ad vicem Regis dignitatis Cancellarii subscripsi.*'"—Lord Ellesmere's Observ. 14, 15.

† 1. "Imprimis—quod sint duodecim magistri Cancellarie sicut olim Ordinarij."

2. "Item quod Custos Rotulorum sit unus et primus eorundem duodecim."—Sand. Ord. 7 b. temp. Hen. V.

but as their name and office only have become extinct whilst their judicial and ministerial functions must of necessity be continued and be performed through the medium of other channels, it may not be amiss to say a word or two respecting those officers who for so long a period had been associated with the Court of Chancery.

The duty of every master was to execute the orders of the Court of Chancery, upon references made to them by the court, acting either in exercise of its original jurisdiction, or under any Act of Parliament, or by the lord chancellor, in lunacies or bankruptcies (*g*), and by reports in writing, to certify in what manner they had executed such orders. Each master executed the orders of reference made without the interference of any other master.

The creation of the masters in chancery, for assisting the chancellor in some of the minor details of his duties, was of very ancient date. As will be stated hereafter, the common-law power of the chancellor comprehended, among other important functions, that of issuing all original writs. When, therefore, the gradual increase of the chancellor's duties rendered it necessary to engage some other persons to relieve him, or share in his responsibilities, a certain number of clerks, called *Præceptores*,* (*quod brevia, causis examinatis, remedialia fieri præcipiunt*), men of considerable importance both in Chancery and in the Parliament, were associated

But in the reigns of Edward VI. and Elizabeth there were only six masters, according to the authority of Sir Thomas Smith, who, speaking of them in his own time, says they were assistants in the court, "to show what is the equity of the *civil law* and what is *conscience*."—Commonw. of Engl. ed. 1663, 12mo.

(*g*) 5 & 6 Vict. c. 84, *infra*.

* These masters, as their ancient name *Clerici* imports, were generally, if not always, ecclesiastics or doctors of the civil law (Duck, p. 29), possessing, as an essential qualification, a sound knowledge of the laws of England.—Fleta, lib. ii. c. 13, p. 76.

with him as *Collaterales et Socii.* They were afterwards (*h*) called *Masters,* or *Clerici de primâ formâ* (*i*); and probably their number was twelve, as in the next reign they are expressed to be (*k*). Their appointment was anciently, by patent from the crown, although the patronage of such appointment belonged to the lord chancellor.* In former times they seemed to have established a kind of college among themselves, living together either in the king's house, or in some hostel especially assigned to them for that purpose, and were supported by church preferments out of the patronage of livings in the king's gift under the value of twenty marks, which were entrusted to the chancellor for that purpose (*l*).

This department of Chancery, the *officina brevium,* was thus established; and the duties of the masters, as to the issuing of writs, were to hear and examine the complaints of such as sought redress in the king's court, and to furnish them with appropriate writs (*m*).

The matters which became the subject of reference to the masters were so numerous, as to render it impossible to detail them with any degree of accuracy, as they were as varied as the subjects which are made cognizable by the court; but the reader will find a general statement of those heads of reference in that part of the subject which treats of proceedings in the chief clerk's office.

(*h*) Temp. Edward III.

(*i*) Hargrave's L. Tr., Treatise of the Masters, 295.

(*k*) Ord. Cancell. 12 Richard II., Sand. Ord. p. 1.

* The eleven masters, as also the master of the rolls, were, in ancient times, appointed by the king; but, in the reign of Edward IV., the appointment of the eleven masters was committed to the chancellor, whilst that of the master of the rolls remained in the crown. Mr. Spence states that after an interval of nearly four hundred years, they were again appointed by patent from the crown.—360, n. (*g*).

(*l*) Spence, 359, n., and 360.

(*m*) Fleta, lib. ii. c. 13, p. 77; Spence, 238.

The last few years have witnessed a greater revolution in the chancery proceedings and practice than has been seen for many previous ones. Not only has a sudden change been felt throughout the practical department of the courts of equity, but a most important branch of the jurisdiction, the masters' offices in Chancery, which for centuries formed part and parcel of the system, has, by an Act of Parliament, been suddenly lopped off, and its powers and functions become merged in that of the judges themselves. The yawning chasm which for ages had contrived to swallow up the hopes as well as the estates of the current generation of suitors has at length been finally closed; whilst, by another potent Act of the Legislature, the almost interminable longevity of a chancery suit, like the post-diluvian race of men, is doomed to have its days considerably shortened, so that henceforth one may sometimes calculate within a few months when a suit, once commenced, is likely to be brought to an end. A youthful lawyer may now expect to see the origin, progress and termination of a succession of chancery suits during his mortal life, though they shall in number equal the reigns which the venerable Jenkins is said to have witnessed. The two Acts of Parliament, 15 & 16 Vict. c. 80, and 15 & 16 Vict. c. 86, which have accomplished these important changes, will long retain a prominent position in the public mind, as well as in the memory of the legal practitioner.*

For a considerable period, however, it may not be amiss to preserve a knowledge of the old practice, for until the ancient suits shall have become extinct through age, or their natural existence abridged by consent of the opponent parties, it will be necessary to understand something of their past history, such as the filing of the bill written on parchment;

* By these Acts and divers other Acts and Orders also, as will hereafter appear, many equitable questions may be brought before the court without the formality and delay of a regular suit by bill, and be speedily settled, by means of petitions and summonses.

summoning the defendant by means of a subpœna to appear to and answer the bill; the defendant taking an office copy of the bill, sometimes of appalling magnitude; his answer to the interrogatories, viz. confessing and avoiding, traversing and denying, all the allegations in the bill which he might be required to answer; the six weeks for that purpose after appearance and answer; another six weeks before the answer was deemed to be sufficient from effluxion of time; the replication; the commission to examine witnesses after issue joined; passing publication; decree; reference to the master in rotation; a due acquaintance with those mystical things called warrants, by which the master's business was conducted, who after travailling for somewhat less than a whole generation in the retirement of their respective offices, produced at length, as the result of their labour, a huge mass of paper called the master's report, followed by a decree upon further directions; and lastly, as its name imports, the final decree.

Before entering upon the consideration of these two important Acts, to which reference has just been made, it will be necessary to mention Sir George Turner's Act, the 13 & 14 Vict. c. 35; for, although the 50th and 51st sections of the 15 & 16 Vict. c. 86, will in some degree supersede the provisions of that Act in regard to expense, yet, where the parties can all agree, they must proceed as therein pointed out. It is intituled, "An Act to diminish the Delay and Expense of Proceedings in the High Court of Chancery," and provides in section 1, "That it shall be lawful for persons interested, or claiming to be interested, in any question cognizable in the said court as to the construction of any Act of Parliament, will, deed, or other instrument in writing, or any article, clause, matter or thing therein contained, or as to the title or evidence of title to any real or personal estate contracted to be sold, or otherwise dealt with, or as to the parties to, or the form of, any deed or instrument for carrying any such contract into effect,

or as to any other matter falling within the original jurisdiction of the said court as a court of equity, or made subject to the jurisdiction or authority of the said court by any statute not being one of the statutes relating to bankrupts, and including, among such persons, all lunatics, married women, and infants, in the manner and under the instructions thereinafter contained, to concur in stating such question in the form of a *special case* for the opinion of the said court; and it shall also be lawful for all executors, administrators, and trustees to concur in such case."

The first six sections of the Act point out the mode in which persons not *sui juris*, or those under disability, may, through the medium of those placed over them, concur in such case (*vide* 23 & 24 Vict. c. 38, s. 14, under "special cases," *infra*, p. 557).

The main question which arises under the Act is, whether the parties can all agree upon the facts necessary to form a case for the opinion of the court? If the parties can so agree, then the Act, throughout the first eighteen sections, is intended to prevent the inconvenience so peculiar to the Court of Chancery, in respect to a declaratory decree, involving, as it would, all the expense and delay of a regular chancery suit, which professed to do justice and administer complete relief to all parties. Considerable care is taken in respect to idiots, and other persons under disability, as to such agreement, in order to render the Act available. But it is to be observed, that under the 19th and following sections of the Act (enlarged by 23 & 24 Vict. c. 38, s. 14), that its provisions extend also to summary applications by executors or administrators, in reference to personal estates only, to have their accounts taken by the court, when, if necessary, an administration will be ordered of the personal estate. But by the 45th and 47th sections of the 15 & 16 Vict. c. 86, an additional summary remedy is provided for creditors, and other persons interested under the will, or as

next of kin, who may apply to a judge by summons without filing a bill for administration of both the real and personal estate of the deceased.*

The masters in chancery then have ceased—their legal existence having been put an end to by the 15 & 16 Vict. c. 80. This Act professes to be one "To abolish the Office of Masters in Ordinary of the High Court of Chancery, and to make Provision for the more speedy and efficient Dispatch of Business in the said Court."

The above Act was passed upon the recommendation contained in the Report of the Chancery Commissioners. Their first Report bears date January 27th, 1852; and it was upon this Report that the respective Acts 15 & 16 Vict. c. 80, and the 15 & 16 Vict. c. 86, were founded. The object of both these Acts was, as above expressed, to carry out the purposes of justice with the least possible delay and expense to the suitor. And it was justly conceived by the learned commissioners, that the course of procedure adopted in the masters' office was just the very means for not producing so desirable a result; for, according to their statement, "the system, obviously calculated to cause unnecessary delay and expense, had its origin at a time when the masters and their clerks were paid by fees."

The first few sections of the Act relate simply to the abolition of the masters' office, their release from their duties, their salaries and compensation, and the winding-up matters and causes then before them, and also the duties of the remaining masters (*vide* sects. 1—10 inclusive).

* This Act does not enable executors and administrators to apply. Under the 22 & 23 Vict. c. 35, also, provisions are made enabling trustees and executors to administer trusts and distribute assets in certain prescribed ways without responsibility and without applying to the court. And by the same Act, sect. 30, and 23 & 24 Vict. c. 38, s. 9, trustees, executors and administrators may take the opinion of the judge in a summary way as to the management or administration of the trust property or the assets of any testator or intestate.

The powers of the judges sitting in chambers to perform the duties formerly transacted by the masters are pointed out in sections 11 and 12, which provide that, from and after the first day of Michaelmas Term, 1852, it shall be lawful for the master of the rolls and the vice-chancellors for the time being, and they are thereby required, in conjunction with their respective courts' business, to sit at chambers, in proper rooms attached to the courts, for the dispatch of such part of the business of the court as can be carried on without any detriment to the public arising from the discussion of questions in open court, according to the directions therein contained, and at the times during which they shall respectively so sit.

By section 13, these judges, when sitting in chambers, shall have the same power and jurisdiction, in respect to the business brought before them, as if they were sitting in open court; and the orders made by them in their respective chambers are to be drawn up by their respective clerks, or by the registrar of the court, in the same manner as orders made in open court are now drawn up; and each one of the judges at chambers may require the attendance of the registrar of the court to be in attendance at chambers (sect. 14).

Section 15, which ought to be read in connection with section 13, is deserving of notice, as it places the jurisdiction exercised by a judge sitting at chambers upon an equal footing with orders of the Court of Chancery, which as such may be signed and enrolled in like manner; and all such chamber orders shall be entered as and where orders made in open court are entered (35 Cons. Ord. r. 32).

For the purpose of assisting in the general business of each court, the master of the rolls, and each of the vice-chancellors, with the approbation of the lord chancellor, are empowered to appoint certain chief clerks, each to be respectively attached to each such judge and his successors in

office (sect. 16). These chief clerks are required to have been either chief clerks to the masters in ordinary, or solicitors, or attorneys, of ten years' practice (sect. 17); and to each of these chief clerks the judge of each court may appoint a junior clerk (sect. 18).

The lord chancellor may remove any person accepting office under this Act who shall be found engaging in any employment, or receiving any sum of money or benefit other than his salary, or what he is allowed to take under any Act of Parliament or order of the court or of the lord chancellor; or if such person, being or having been a solicitor or attorney, shall directly or indirectly receive or secure to himself any continuing benefit from any business or firm in which he may have been engaged previously to his appointment to such office, the person so offending may be removed by the lord chancellor, and shall be rendered incapable of afterwards holding any office, situation, or employment in the court (sect. 19); and every solicitor or attorney appointed to any office under the Act must forthwith cause himself to be struck off the rolls (sect. 20). Every chief clerk is to hold his office during his good behaviour (sect. 21), subject to his being removed by the lord chancellor as stated in sect. 25; and every junior clerk shall hold his office at the pleasure of the judge to whose court he may be attached (sect. 22): and both the chief and junior clerks are to be under the *control* and *direction* of the judge to whose court they shall be respectively attached, and shall attend at such places, during such times, and for such hours in each day, and perform such duties, as such judge shall from time to time direct (sect. 23). And they are to be subject to the same prohibitions, prosecutions, penalties, and punishments as are imposed by the 3 & 4 Will. IV. c. 94, as respects officers of the Court of Chancery (sect. 24); and the lord chancellor may, with the concurrence of the master of the rolls and vice-chancellors, or any two of them, without assigning any

cause, by any order, remove any chief clerk to be appointed under the Act (sect. 25).

The next part of the Act relates to the business to be transacted by the judges sitting in chambers; and it is provided, by section 26, that such business shall consist of such of the matters therein pointed out as the judge shall from time to time think may be more conveniently disposed of in chambers than in open court.

Commissioners to administer Oaths.—These officers exercise the powers and perform the duties which formerly belonged to the office of *masters extraordinary in Chancery*. The duties of these latter functionaries consisted in taking affidavits appertaining to any matter depending in or relating to the Court of Chancery; to take the acknowledgment of deeds to be enrolled in the court, and to take such recognizances as might by the tenor of the order for entering into them be taken before a master extraordinary.

The Accountant-General.—This officer was first appointed by the statute 12 Geo. I. c. 32, and stands in the situation of the master and usher of the court. This statute, among other things, directed that there should be one person appointed by the Court of Chancery, to perform all such matters relating to the delivery of the suitor's money and effects into the bank, and taking them out of the bank, and the keeping the accounts with the bank, and all other matters relating thereto, as were done by the master and usher; such officer to be called the accountant-general of the Court of Chancery, and to hold office during the pleasure of the court.

The Governor and Company of the Bank of England have the general custody of the effects belonging to the suitors of the Court of Chancery, as the bankers of the court, subject to the orders of the court. These effects consist of cash, stock, exchequer bills, Indian bonds, shares in public companies, and specific articles deposited. All these effects are

placed in the bank in the name of the accountant-general; but he does not receive any of the suitors' money or effects into his own custody, but his duty is to keep an account with the bank according to the several causes. The dividends and interest of the several stocks, Indian bonds, and other securities, are received by the bank as they become due under a power of attorney from the accountant-general, and placed to the credit of the causes and accounts to which they respectively belong.

Here the student will be reminded of the new Orders in Chancery, which came into operation from the 1st February, 1861, relating to the investment of cash under the control of the court, and are made in pursuance of stat. 23 & 24 Vict. c. 38, s. 10. By section 11, and also by virtue of the above-mentioned orders, trustees, executors, or administrators having power to invest their trust money upon government or real security, stocks, funds, and securities, may now, under the control of the court, invest them in Bank stock, East India stock, exchequer bills, and 2*l.* 10*s.* per cent. Annuities, and upon mortgage of freehold and copyhold estates in England and Wales, as well as in Consolidated 3*l.* per cent. Annuities, Reduced 3*l.* per cent. Annuities, and New 3*l.* per cent. Annuities (Ord. 1).

For each sum of money to be received by the bank the accountant-general signs a certificate, mentioning the order, report, or Act of Parliament, under the authority of which the person named in the certificate is to pay the sum therein specified, and directing it to be placed to his account, as accountant-general, to the credit of the particular cause or account mentioned. When the party paying in the money, or his solicitor, brings into the accountant-general's office a certificate from the bank of such payment having been made, the accountant-general signs another certificate of such payment, and annexes it to the bank certificate, for the purpose of being entered in the report office.

Registrars.—The duties of these officers are to attend in court, as the lord chancellor, with the concurrence of the master of the rolls and the vice-chancellors, or any two of them, from time to time by any general order may direct (5 Vict. c. 5, s. 39). They draw up minutes, decrees and orders, and make copies thereof, mark exhibits proved in court *vivâ voce*, and sign certificates; enter for hearing pleas, demurrers, causes, appeals, re-hearings, further directions, further considerations, exceptions, appeal motions and motions for decree, and make out a book of the same; deliver notes for subpœnas to hear judgment, make out a paper of causes and other matters to be heard in court, and receive deposits upon filing exceptions and bills of review, and also upon setting down petitions for re-hearing and of appeal. The deposits on setting down appeals and exceptions for hearing are, once in every three months, to be paid into the bank by the senior registrar to the credit of the accountant-general, and placed to the "Appeal Deposit Account" (15 & 16 Vict. c. 87, s. 41). The number of registrars was, by 5 Vict. c. 5, s. 38, increased to ten, and, by sect. 40, the number of their clerks to twelve. By 14 & 15 Vict. c. 83, s. 21, the lord chancellor is empowered to appoint an additional registrar (see Smith's Ch. Pr. ed. 6, p. 21).

By the 18 & 19 Vict. c. 134, the report office was abolished. The business of that office, with the exception of such part of it as was transacted by the entering clerks, is now conducted under the superintendence of the clerks of the records and writs, who perform all the duties relating to the report office belonging to the office of master of reports and entries. The part of the business transacted by the entering clerks is carried on by them under the control of the senior registrar for the time being. They are called the entering clerks to the registrars (sects. 5 and 6).

By the 3 & 4 Will. IV. c. 94, the office of master of reports and entries, two clerks, to be called clerks of entries,

and ten clerks of accounts, were appointed.* The duties formerly transacted by the master of the report office, by the entering registrars or entering clerks, or by the clerk of the exceptions, so far as found necessary, were performed by the master of reports and entries in the manner mentioned by the above Act. By the 30th Gen. Ord., 21st December, 1833, made in pursuance of that Act, the duties of these officers were regulated (Smith's Ch. Pr. p. 25).

Examiners.—Their duties formerly were to receive all interrogatories for the examination and cross-examination of witnesses in any cause in the Court of Chancery; to examine and cross-examine such witnesses; to prepare the depositions of such witnesses in writing; to read over such depositions to the witnesses previously to their signing the same; to certify in writing the different documents deposed to by the witnesses on their examination; to sign notices for the attendance of witnesses to be served with subpœnas; to grant certificates that interrogatories were or were not filed, and that witnesses had or had not attended for examination, and such other certificates as occasion may require.† But since the passing of the 15 & 16 Vict. c. 86, after providing for the oral examination of witnesses in certain cases, and reciting in sect. 65 that the public examination of witnesses orally under the provision of the Act would materially alter the nature of the duties and increase the responsibilities of the examiners, it empowers the lord chancellor to increase the salaries of the respective examiners as therein mentioned.

As to the nature of their increased duties, the object of the above Act being to assimilate the examination in Chancery as much as possible to the method pursued in the courts of common law, it will be seen, by referring to the

* See 15 & 16 Vict. c. 87, s. 27.

† Rep. p. 42.

31st and 32nd sections of the Act, that witnesses are to be examined orally before one of the examiners in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined shall be subject to cross-examination and re-examination, which shall be conducted as nearly as may be in the mode now in use at common law where the witness is about to go abroad and not expected to be present at the trial (sect. 31). The depositions taken upon any such oral examination shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when complete shall be read over to the witness and signed by him in the presence of the parties, or such of them as may think fit to attend; but the examiner may, in his discretion, put down any particular question or answer if there shall appear any special reason for so doing; and which may be objected to is to be noticed or referred to by the examiner in or upon the depositions, and he is to state his opinion thereon to the counsel, solicitors, or parties, and to refer to such statement on the face of the depositions. The examiner has not power to decide upon the materiality or relevancy of any question (sect. 32).

When the examination is concluded, the original depositions, authenticated by the signature of the examiner, are transmitted by him to the record office of the Court of Chancery, to be there filed, and any party to the suit may have a copy thereof, or of any part thereof, upon payment for the same in such manner as shall be provided by any general order of the lord chancellor in that behalf (sect. 34).*

* The examination in chief before an examiner, however, in a cause where issue is joined, is taken *ex parte*, and not revealed to the other side till the evidence is closed (Gen. Ord. 5 Feb. 1861, r. 6), unless the parties agree or the court directs the examination, cross-examination, &c. of any witness to be taken in accordance with the above sections of the Act; and except in suits to perpetuate testimony or where issue was joined before Easter Term, 1861.

Instead of suing out a commission for the examination of a country witness as heretofore, a *special examiner* appointed by order of the court has the like power of administering oaths as commissioners formerly had under commissions issued by the court for the examination of witnesses (sect. 35).

The office of SIX CLERKS is now abolished; but, whilst they enjoyed an existence, their duties were to receive and file all bills, answers, replications and other records in all causes on the equity side of the Court of Chancery, and to enter memoranda of them in books, from which they were to certify to the court, as occasion might require, the state of the proceedings in causes. They signed all copies of pleadings made by the sworn clerks and waiting clerks, after seeing that the originals had been regularly filed; after every term they presented, to be set down, the causes ready for hearing in the ensuing term, either before the lord chancellor or the master of the rolls. They examined and signed dockets of decrees and dismissions prepared for enrolment, and saw that the records and orders were duly filed and entered, which they certified previously to the presentation of dockets to the lord chancellor, the master of the rolls, or the vice-chancellor, for signature.

To the six clerks were entrusted all the records in their office, which remained in their studies for the space of six terms, for the sworn clerks and waiting clerks to resort to without fee (*n*).

In pursuance of the 5 & 6 Vict. c. 143, abolishing the six clerks' office, it was ordered—

1. That all acknowledgments, affidavits or affirmations required for the purpose of enrolling any deed or other document in Chancery, may be sworn or affirmed before the *Clerk of Enrolments* in Chancery, or before any *Clerk of Records*

(*n*) Rep. p. 45.

and Writs, as occasion may require, for the better dispatch of business.

2. That the Clerk of Enrolments in Chancery shall take and receive all such fees and sums of money as have heretofore been lawfully received by the clerks of enrolments and their deputies, or by the six clerks or any of them, as comptrollers of the Hanaper, or as Riding Clerk ; and shall pay all such fees and sums of money into the Bank of England, in the name of the accountant-general, to be placed to the credit of the account, intituled "The Suitors' Fee Fund Account."

3. That the Clerks of Records and Writs shall perform all such duties as have heretofore been performed by the six clerks, sworn clerks or waiting clerks, as officers of the court, in relation to the several matters hereinafter mentioned ; that is to say, the filing, copying and amending of all informations, bills, demurrers, pleas, answers and other pleadings and records ;* the entering of appearances, rules, consents, notes and memoranda of service ; the certifying of appearances and proceedings ; the custody of extracts, deposited for inspection and copying ; the attendance with records and extracts on the judges of the court, on the masters-in-ordinary, and at assizes or elsewhere ; the enrolment of decrees and orders ; and all other duties heretofore performed by the six clerks, sworn clerks or waiting clerks, as officers of the court in relation to suits and matters in equity, and not as attorneys, solicitors or agents of the parties in suits or matters in equity.

Provision was also made to appoint officers for the separate business of taxation ; for by the 9th Order, Oct. 1842,

* The fees formerly paid by a defendant to the six clerks, upon taking an office copy of a bill in Chancery, are still payable to the clerks of records and writs; and they may refuse to file an answer to a bill, an office copy of which has not been taken by the defendant.—Aked *v.* Aked, 7 Jurist, 75.

it is declared that the TAXING MASTERS shall perform all such duties as have heretofore been referred to or performed by the masters-in-ordinary in relation to the taxation of costs, and shall, in respect thereof, have all such powers and authorities as are now vested in the masters-in-ordinary,—

To administer oaths;

To examine witnesses and parties;

To order the production and inspection of books, papers, and documents;

To proceed *de die in diem;*

To make separate reports and certificates;

To require that any party be represented by a separate solicitor;

And to direct and adopt all such other proceedings as may now be directed and adopted by the master-in-ordinary, on references for the taxation of costs, and taking accounts of what is due in respect of such costs and such other accounts connected therewith, as may be directed by the court.

That the SOLICITORS of the court, in all cases where the parties sue or defend by solicitors, and the parties themselves, in all cases where they sue or defend in person, shall perform all such duties as have heretofore been performed by the sworn clerks and waiting clerks, as attorneys, solicitors, or agents of the parties in relation to the several matters therein mentioned.

MASTERS IN LUNACY.—The office of clerk of the custody of lunatics and idiots was made to cease under the 5 & 6 Vict. c. 84, and the Ord. 27th Oct. 1842, and all inquiries and matters connected with the persons and estates of lunatics theretofore usually referred to the masters-in-ordinary (except under the 11 Geo. IV. & 1 Will. IV. c. 60, as to estates vested in lunatic trustees, etc., and except where the lord chancellor should otherwise specially direct) are to be thenceforth referred to the commissioners in lunacy for the time being.

But it was found necessary to expedite and simplify proceedings in lunacy, and to diminish the expenses usually attendant on such proceedings, and therefore an Act of Parliament was passed (16 & 17 Vict. c. 70, 1853), intituled "The Lunacy Regulation Act." This legislative enactment and the General Orders of October, 1853, have made considerable alterations in the practice of the court on matters of lunacy. By the 39th section it is enacted, "That in lieu of the commission now issued specially in such case of alleged lunacy, a general commission to the like effect, with such variations as may be necessary or expedient, may from time to time be issued in duplicate under the Great Seal directed to the masters in lunacy by name jointly and severally, who shall, by virtue thereof, proceed in each case of alleged lunacy concerning which the lord chancellor shall order them to inquire, in like manner, and with all the like powers and authorities (subject to the provisions therein contained), as if a commission had issued specially in such case, and every inquisition found and returned thereon shall be as valid and effectual to all intents and purposes as if the same had been found and returned on a separate commission."

The object of the Act and the General Orders is to empower the masters in lunacy, without the special order of the lord chancellor, to enter upon the necessary inquiries and to receive any proposal relating either to the management of the person or the property of the lunatic.

In making the application to the master, a state of facts and proposal must be submitted to him, stating shortly what the parties propose to do and the mode of effecting it, together with evidence as to its propriety.

Of the alterations affecting the proceedings, both for inquiring into the state of mind of the alleged lunatic and for providing afterwards for the due care and management of

his person and estate, the following are enumerated by Mr. Elmer (*o*).

"A general commission has been assigned to the masters in lunacy in lieu of the special commission formerly issued in each case.

"Juries are dispensed with unless in particular cases, if it be found important to call them.

"The inquiry as to the state of mind is, except under special circumstances, not carried back, but limited to the present time.

"All matters affecting the person and property of the lunatic may, after the inquisition, be presented before the masters without any special order of the lord chancellor for the purpose.

"The master's reports in all ordinary cases contain the directions consequential upon them, and are submitted to the lord chancellor for confirmation without petition; the fiat of his lordship thereon giving to them the operation of orders.

"The grant of custody, which was so expensive, is abolished, and the committee's security is settled by the masters without the expense of referring it to the attorney-general.

"Enlarged powers for the management of the estate are conferred upon the lord chancellor and the masters.

"And the provisions for ensuring, through the visitors and the masters, the proper care and treatment of the lunatic are made more comprehensive" (*p*). (Preface.)

Conveyancing Counsel.—It is now provided, that any of the judges sitting at chambers may receive and act upon the opinion of conveyancing counsel, with regard to such matters wherein the masters have hitherto been in the habit of requiring such opinion, with liberty for any party to

(*o*) Prac. in Lunacy, Edit. 1857.

(*p*) See also 25 & 26 Vict. c. 86, and 32 & 33 Vict. c. 91.

object to such opinion, when he shall deem it open to objection; and therefore the point in dispute shall be disposed of by the court, or by the judge sitting in chambers.—15 & 16 Vict. c. 80, s. 40—41.

Assistance of Scientific Persons.—Any judge may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to assist him in any matter at issue, in any cause or proceeding, and to act upon their certificate.—*Ibid.* s. 42.

Clerks to the Judges.—For the purpose of assisting in the general business of each court, the master of the rolls and each of the vice-chancellors, with the approbation of the lord chancellor, are empowered to appoint two chief clerks, each to be respectively attached to each such judge and his successors in office. Their functions and qualifications, together with the junior clerks, are pointed out by the same last-mentioned Act, ss. 14, 16, 17, 18, 19, 20, and 23.

Besides these various officers of the court, whose duties are more important, there are others of an inferior and subordinate character, which it is not necessary to enumerate here.

New Orders.—It may not be improper to mention in this place that, in the month of April, 1828, a new set of orders, consisting of eighty-one in number, were issued, under the sanction and direction of the lord chancellor, the master of the rolls, and the vice-chancellor, for the better regulating the conduct of suits.

In November, 1831, it was directed that these orders should be amended, as to Numbers 6, 13, 16, 17, 18, 19, 24, 76, and 82, in manner as therein directed.

But, as it was found expedient that certain further orders for regulating the practice of the Court of Chancery should be added to those which were published in November then last, and that thereupon certain alterations should be made in the said orders, and that it was also expedient that the

whole of the said new orders should be embodied together, under the Act of 3 & 4 Will. IV. c. 94, intituled "An Act for the Regulation of the Proceedings and Practice of certain Offices of the High Court of Chancery," it was declared and directed by the lord high chancellor, with the concurrence of the master of the rolls and vice-chancellor, that from and after the 10th of January, 1834, the orders therein mentioned, from Nos. 1 to 36, both inclusive, should be considered as substituted for those of 26th November then last. All these, with the more recent ones, which bear date the 26th of August, 1841, and 11th of April, 1842, together with the New Orders of 8th May, 1845, and all the subsequent orders, were referred to, according to their respective dates,* until they became merged in the Consolidated Orders of 1860.

The Consolidated Orders, as published, are distinguished by being numbered with Roman capitals, and are divided into rules, and these rules are sometimes subdivided into articles. The rule is known by an Arabic numeral simply, whilst the article is enclosed in a parenthesis, and answers to the articles under the 16th Order, 8th of May, 1845.

Any rule of the Consolidated Orders is generally cited thus in court, "The 10th of the Consolidated Orders, Rule 11th," or in a book with greater brevity thus, "10th Cons. Ord. r. 11."

In referring to the published book of Consolidated Orders, the student will find an asterisk prefixed to the rules in which the practice is changed.

* The first five of the Orders of 26th August, 1841, not being much relished by the profession, never came into operation. They were, therefore, by an Order of 19th November following, suspended until Easter Term, 1842. The 4th Order of 11th April, 1842, provided that they should not take effect until further order; and they are now, by the Orders of 26th October, 1842, rendered wholly useless.

Proceedings in Equity,

ETC.

PART I.

BRIEF HISTORICAL OUTLINE OF THE COURT OF CHANCERY.

CHAPTER I.

Rise and progress of our jurisprudence.

In a rude and half-civilized age, when as yet commercial successes had not brought amongst us their invariable attendants, luxury and refinement, the few leading principles which regulated our courts of justice were found sufficient for all ordinary transactions then claiming their cognizance; but when trade, commerce, and other similar pursuits had introduced a system of life becoming every day more and more complicated and ramified, calling for a multitude of remedies proportioned to the increase of rights and their consequential injuries, these courts of justice were found inadequate for the purpose, and it was soon discovered that there existed rights to which they offered no protection, and injuries which they could not redress (*a*). Thus it has been found in the history of most

(*a*) Coop. 27.

151

CHAP. I.

countries, that, although the object of legislators in framing their laws has been as much to establish a system which could equally provide for the growing as the then existing wants of a community, yet no positive enactments, however deliberately and maturely considered, have been able to anticipate the exigencies daily arising amongst an increasingly populous and enterprising people. The progressive improvement of our system of jurisprudence may be compared to the fabric of English liberty described by Mr. Hallam, which "rose step by step, through much toil, and many sacrifices; each generation adding some new security to the work, and trusting that posterity would perfect the labour, as well as enjoy the reward" (*b*). Thus it is that systems in accordance with the principles of natural and universal justice have sprung up, softening the asperities, supplying the deficiencies, guiding and assisting the administration of positive law, and offering redress where, from its nature, that law could give none; and this deciding upon principles of natural justice is defined to be "judging according to equity" (*c*). Such a tribunal as a court of equity, being so admirably adapted for the purpose of granting complete justice, exists, under some modifications, in almost every civilized country in the world.

Purpose of courts of equity. Difference between the equitable tribunal in other countries and that of our own.

It was well observed by Lord Chancellor Cottenham, in referring to the jurisdiction of our equitable tribunal, that it was the duty of the court to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and enforce rights for which there is

(*b*) Midd. Ages, iii. 217. (*c*) Mitf. Pl.

no other remedy (*d*). "It is therefore impossible," said that learned judge in another case (*e*), "with precision to lay down rules or establish definitions as to the cases in which it may be proper for this court to exercise the jurisdiction. The infinitely varied transactions of mankind would be found continually to baffle such rules and to escape from such definitions. It is therefore necessary for this court to reserve to itself a large discretion, in the exercise of which due regard must be had, not only to the nature of the case, but to the conduct of the parties." In Rome the equitable jurisdiction was eminently conspicuous in the office of prætor, who was called upon to determine according to the written or positive law, and give judgment according to equity and conscience, where a rigid adherence to the strict letter of the law would work a hardship or injustice (*f*). But the chief distinction between the prætor's tribunal and the one now termed the Court of Equity is this,—that at Rome there was no separation of the legal from the equitable jurisdiction, inasmuch as the same judge pronounced the law or the equitable sentence from the same tribunal. The Court of Session in Scotland is a court of equity as well as a court of law (*g*); in England the courts for the administration of law and equity are perfectly distinct; and in this instance, it would seem, we differ from every other country whatever (*h*).

Equity as administered at Rome.

In giving a slight historical sketch of the rise and progress of our courts of equity, it may be proper in the first place to observe, that among the Romans it was the custom of the prætor, when he entered upon his duties, to propound a set of rules, or course of procedure, by which he professed to regulate his decisions during his

(*d*) Taylor *v.* Salmon, 4 My. & Cr. 141.
(*e*) N. E. Ry. Co. *v.* Martin, 2 Phil. 762.
(*f*) Dig. 28, 3, 12. (*g*) 2 My. & Cr. 732. (*h*) Bl. b. 3, 50.

CHAP. I.

yearly office. These rules were enrolled in the *album prætoris*, which served as a protection to the public against any abuse of office. This power of administering the rules of equity was afterwards assumed by the emperors exclusively. This will appear, by referring to the code of the Emperor Constantine, "*De interpretatione inter æquitatem et jus*," when he declares "nobis solis et oportet et licet inspicere"(*i*), and further, in the same code, "Leges sacratissimæ quæ constringunt hominum vitas, intelligi ab omnibus debent, ut universi præscripto earum manifestiùs cognito, vel inhibita declinent, vel permissa sectentur. Si quid verò in iisdem legibus latum fortassis obscuriùs fuerit, oportet id (ab) imperatoria interpretatione patefieri, duritiamque legum nostræ humanitati incongruam emendari."—*Imp. Valentin* (*j*).

Duties of the Roman prætors.

The prætors appear to have exercised both a legislative and also a judicative power. The *edicta magistratuum* consisted of the edicts of the prætors and of the ædiles, and composed that part of the Roman system known as the *jus honorarium*. The prætor, as before noticed, published a set of rules, or formulæ, upon entering into office, by which he professed to regulate his judicial conduct for the ensuing year, and, by enrolling these rules in the *album prætoris*, gave a guarantee of what should be his system of procedure during his continuance in office: this it seems was required for the purpose of counteracting the rigour of the laws of the Twelve Tables, at a time when they had scarcely been established as a regular system of jurisprudence. The prætors were therefore required to modify and supply the mischievous effects of the written code, in accordance with the claims of natural justice and equity (*k*), in those cases where a strict observance of the rules of such code would produce too great severity and injustice.

(*i*) Cod. i. 14, 1. (*j*) Ibid. tit. xiv. 9. (*k*) Dig. L. 23, 3, 8.

Emperor Hadrian's perpetual edict.

The Emperor Hadrian published his celebrated code of equitable jurisprudence, or *Edictum perpetuum Hadriani;* which he compiled from the edicts of former prætors, and digested in fifty books: as it constituted the most important part of the *lex scripta*, it was followed by Justinian, when he compiled his Decretals, and also by the canonists and distinguished lawyers afterwards (*l*). This compilation was intended to regulate the conduct of all subsequent prætors, by affording them one uniform system of equity; and, although this code was not in itself so complete as to furnish an ample remedy in every case which subsequently called for the interposition of the prætorian judges, it did, nevertheless, constitute such a *fons justitiæ*, as to infuse into the system of Roman jurisprudence copious supplies of equitable principles, even when the appellant jurisdiction from the severe maxims of law, had become exclusively vested in the emperors. The same may be said of our common law; which, after the courts of chancery had once become established in this country, adopted many of the principles and maxims of equity into its own system. Indeed, in contemplating the numerous calls for equitable interference in all cases of contract, such as the emptio venditio, locatio conductio, pignus, commodatum, etc., which formed so refined and important a department of the Roman law, wherein mistakes, mis-statements—not to say fraud and circumvention—were constantly arising, under circumstances which rendered it impossible for them to be anticipated by any written system of positive law, we cannot but admit that recourse must necessarily have been had to some extraordinary jurisdiction, for the purpose of enforcing that bonam fidem *quæ æquitatem summam desiderat* (*m*).

Among

During the Anglo-Saxon times, there seems to have

(*l*) D. 1, 6, 2; C. 1, 17, 1, 5; C. 4, 5, 8.
(*m*) D. 16, 3, 31; 19, 2, 24; 19, 1, 50.

CHAP. I.

the Anglo-Saxons, appeals in matters of equity lay to the king only.

existed some vague notion of a course of proceeding distinct from the common rules of judicature ; and this mode of procedure, so like that which regulated the civil law practice under the prætors, was doubtless upheld by the ecclesiastics, who, on account of their learning, were appointed to sit with the earl in his county court, and who were at all times anxious to introduce the maxims and principles of the Roman law, whenever an opportunity presented itself. It was, however, only to the king, as the source of justice, that an appeal could be made, whenever it became necessary to put into exercise the principles of equity, for the purpose of mitigating the rigour of the established law (*n*). This appeal was not unknown among foreign nations where the civil law was recognized (*o*). The privilege of granting relief by the sovereign, as a matter of royal clemency, was, in after-times, entrusted by him to his chancellor, or to the keeper of the privy seal, who was thereby to determine the subject of complaint according to the rules of equity and good conscience.

Improvements in the law during the reign of Edward I.

It is generally agreed that the reign of Edward I. witnessed a greater advancement in the science of law-making, and matters of general jurisprudence, than any other period of our history previously. It was now that masters in chancery, by virtue of the st. 13 Ed. I., called the Statute of Westminster the Second, were directed to prepare and issue writs in due form in ease of the chancellor. Their duties were, in reference to this department, to hear and examine the complaints of those who sought redress in the king's court, and to furnish them with appropriate writs ; thus they were required to decide, not only what should be the proper form of the

(*n*) Wilk. Leg. Ang.-Sax.; Leg. Polit. sec. 2.

(*o*) Marculfi Monarc. form. lib. i. c. 28; Leg. Longob. lex 2, t. 45; Lindenb.

writ, but whether or no the applicant had really any remedy at common law (*p*). These proceedings afforded a great relief to the suitor, as it abated the rigour which the common law judges showed, in demanding that the forms in the register should be strictly adhered to. It required, however, a considerable lapse of time before a system of equitable jurisdiction could be established in England, sufficient to answer all the requisites in society wherein the common law was silent; and whatever might have been the admitted principles of equity adopted by the law courts, their very constitution was inadequate for the purpose of carrying them into effect.

Revival of the study of the Roman civil law.

The study of the Roman civil law, which had revived some time in the twelfth century, through the accidental discovery, as the story goes, of a copy of the Pandects (although the influence of that system of laws had never entirely ceased to exert itself in some parts of Western Europe), became enthusiastically pursued by members of the most celebrated universities in Europe. The opening of this vast mine of legal knowledge, which had been enriched by the most renowned lawyers of enlightened Rome, and exhibited the accumulated experience of ages, could not escape the attention of the clerical order, who upon every occasion were eager to strengthen their ascendancy over the rude laity. In the study of the civil law, which had not reached its climax until, under several Christian emperors, it became, to a great extent, moulded in conformity with the claims and interests of the Church, the ecclesiastical body found sufficient to reward them for any amount of toil which they might expend in exploring its treasures of legal knowledge.

Reasons for its favourable reception among the ecclesiastical body.

Independently, therefore, of the extensive merit generally allowed to this vast body of law, it must have proved an invaluable boon to the ecclesiastical lawyers of those

(*p*) Spence's Equit. Juris. 238, n. (*e*).

CHAP. I.

times, whose predecessors had carefully transmitted such fragments of the *corpus juris civilis* as had survived the destruction of the Western Empire, wherein the peculiar claims of the clergy, and the favours which they formerly enjoyed by virtue of imperial grants, were recognized and admitted. That the clerical body should therefore so cordially welcome the exhumation of the entire system of Roman jurisprudence, after it had been hidden for ages, and which they regarded as the Magna Charta of clerical privileges,—and, moreover, that they should have exerted such zealous endeavours to imbue the European lawyers with its sentiments, for their judicial and legislative guidance, may be easily imagined. Here was at once a full recognition of their claims, confirmed by imperial authority, and protected by princes who had given laws to the world.

Vacarius at Oxford.

Vacarius, the Italian professor of civil law, the contemporary of Inerius, who taught the science at Bononia, having been induced by Theobald, Archbishop of Canterbury, to visit England, and open a school at Oxford (A.D. 1149), for promoting the study of it here, met with such success as to occasion a complaint that the imperial laws were likely to smother all the rest of the sciences (*q*).

Study of the civil law increases.

Having these ample means of resorting to the judicial wisdom of imperial Rome, both clergy and laity had, in the course of two or three centuries, become tolerably acquainted with the maxims and principles which infused themselves into the sentences of the Roman jurists; and thus, notwithstanding the jealous opposition which this new study had, on its first introduction, to contend with from *the wicked* (*r*), it continued to gain ground among the common law judges and professors in England.

Principles

It would have afforded a curious employment for cer-

(*q*) Duck, 20. (*r*) John of Salisbury.

and maxims of the Roman law gradually insinuated themselves in the rise and progress of the common law of England.

tain of our more ancient text-book lawyers, had they sat down and partially analyzed the ingredients of that production which they denominated the COMMON LAW, separating so much of it as was really indigenous and of English growth, from the maxims and notions imported into it from the Roman code, before they broke forth into such laudatory strains as they frequently indulged in when writing upon their favourite topic; indeed, their acknowledged acquaintance with the writings of the Roman jurists must have convinced them, however much against their will, how difficult it was to avoid a conclusion, which was doubtless by no means flattering to the native independence, and to the mysterious basis upon which that independence has been reared. It is scarcely possible to suppose that any well-read lawyer, captivated as he may be with the notion of Saxon liberty, can proceed far in the study of either system without perceiving a striking analogy between the civil law of Rome and the common law of England, not only as to their maxims and principles, and their technical phraseology, but also their method of practice, showing how early, and to what extent, one system became the instructor and guide of the other. To some minds there is a black-letter witchcraft*

* The reader of Blackstone cannot but observe the enthusiasm in which he indulges whilst panegyrizing the institutions of his country, of which he was perhaps so justly proud. Upon one occasion, the stability and antiquity of our legal system rears itself up before the elegant and picturesque fancy of that distinguished judge in shape of some venerable fabric of baronial origin. "Our system of remedial law," says he, "resembles an old Gothic castle, erected in days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls are magnificent and venerable, but useless—and therefore neglected. The inferior apartments, now accommodated to daily use, are cheerful and commodious, though their approaches be winding and difficult."—B. iii. 268.

CHAP. I.

in the expressions, "Anglo-Saxon liberty," "ancient constitution," and the like; whilst the chances are that, in furnishing an example, they may not unfrequently fall into the whimsical position of seizing upon some relique of Roman jurisprudence, to prove the perfection and justice of their own.*

When we remember that the Romans held possession of this island nearly five hundred years,—and, during that period, some of the most celebrated lawyers administered justice among the conquered Britons, upon the like footing and according to the same system adopted by the conquerors in their own country,—we cannot be

* Sir W. Jones, in his well-known Treatise upon the Law of Bailments, when speaking of the obligation which binds a person to whom a gage or pledge is bailed to take *ordinary* care of it, and therefore responsible for *ordinary* neglect, has the following observation:—"This is expressly holden by Bracton: and, when I rely on his authority, I am perfectly aware that he copied Justinian, almost word for word; and that Lord Holt, who makes considerable use of his Treatise, observes, three or four times, 'that he was an old author;' but, although he had been a civilian, yet he was also a great common lawyer, and never, I believe, adopted the rules and expressions of the Romans except when they coincided with the laws of England in his time."—P. 75.

It is generally admitted that the above Treatise was suggested to that accomplished scholar by the noted case of Coggs *v.* Bernard (Ld. Raym., Rep. 909), and which he himself calls a commentary on it. This case arose upon the question, whether a person, who had made a *gratuitous* promise to remove certain goods, was responsible for damage occasioned by his neglect in its performance. It came before Lord Holt, and drew from that celebrated lawyer a full and clear exposition, or, according to the words of Mr. Hargreave (Co. Litt. 89 b, n. 3), "a most masterly view of the whole subject of bailment." But, although the point appeared to have been a new one in our courts, and was at that time thought worthy of the deliberation which it received, yet it must be confessed that the judgment is based entirely upon the doctrine of the civil law of Rome.—*Vide* Just. Inst.; Hein. Elem. Jur. Civ. "De Oblig."

surprised that such an event had its due influence in stamping a character upon the future institutions of this country, more especially as the Romans imposed their language, as well as their customs, upon the newly-acquired colony.*

Reasons of its influence upon the common law, and its reception among the laity.

The great influence which the ecclesiastics had in all judicial proceedings among the Anglo-Saxons, by reason of their acknowledged superiority both in legal science and in general literature, together with their partiality to the Roman system, would enable them almost imperceptibly to instil the doctrines among the laity which they themselves so highly revered, and which the clergy regarded as the only source of judicial redress when any matter of doubt was reserved for their decision. The same influence in matters of state, and also of legislature, was still permitted to and exercised by the clerical body after the Conquest, as was exerted during the Saxon period of our history; for when the Conqueror held his court three times a year, in continuance of his Saxon predecessor's custom, the bishops, earls, and the greater and lesser barons, together with the knights, assembled. The council which attended the king's person remained the same, as did also the great council, or wittena-gemote, which was formed of the other council, in addition to a large concourse of proceres, with the king at their head. This great assembly was wont to be convened for purposes of legislation, and other important matters which

* According to the opinion of Ings, Chief Justice of the Common Pleas, the common law was founded upon the civil law of Rome, as appears from the Year Book, 5 Edward II., 148:—"Qu respondez vous," said that judge to the bar, "a la loy empiel dõqes sur quel ley de terre est fondu, et qz veot q̃ heritage soit descendu à plus digne quòd possessio fratris facit sororem heredem? Devom; lei empiel ple tout en droit, mes nous sumes en la possession, et rien demãdoins p̃ will.—C. P. Cooper's Append. 553.

CHAP. I.

emanated in the king's name; and, becoming perhaps a little modified by time and circumstances, it is generally admitted to have formed the basis of the Privy Council and House of Lords (*domus procerum*) of the present day. Although there may be very little similarity between the office of the chancellors as they existed in those days of the Saxon dynasty and their important office in modern times; yet, if we consider the power and dignity of the sovereigns in those earlier periods of our own history, we shall not discover so great a disproportion between the king and his chancellor, or bocara or secretary as he might be called, as between the sovereign and the chancellor in more modern times. The Saxon king might indeed be considered as little better than a chief among chieftains, and at the best but the sovereign of a small territory; whilst the chancellor was himself generally an ecclesiastic—one of a body of men who were for the most part the depositaries of all the learning both ancient and modern in the days of our unlettered ancestors—and he therefore became an essential personage in all affairs wherein a deed or any other formal instrument was to be used; and bearing in mind the acquaintance of the chancellors with the literature and laws of ancient nations, and especially with those of Rome, we can well conceive the influence they possessed among our warlike but illiterate ancestors. That this was their principal office among the Anglo-Saxons is certain, and even for some time after the Conquest their functions were not in any respect different, although subsequently they gradually rose to the highest importance. Not long after the coming in of the Norman race, the chancellor subscribed his name, not on account of his office as such, but merely by virtue of his ecclesiastical order, and as the chief among the royal chaplains to whom was entrusted the custody of the documents which were kept in the king's chapel, and also of the royal seal.

For as the Anglo-Saxon kings used to sign their deeds with the Cross, so the Normans were accustomed to affix their seals to all important documents (*s*).

Clerical lawyers.

There were very few persons who, before the Conquest, were skilled in the law except the clergy; and they really possessed the only learning of the times: thus it continued long after that event. In the reign of William Rufus, Alfwin, rector of Sutton, and several monks of Abingdon, were so famous for their knowledge of the laws, that they were universally consulted, and their judgments frequently submitted to, by persons resorting thither from all parts: another of the clerical order, named Ranulph, about that time, obtained the character of *invictus causidicus*. Indeed, the clergy seem to have been the principal practitioners, and were the persons who mostly filled the bench of justice; and so general had this custom become, of clergymen betaking themselves to the study, that it was remarked by William of Malmesbury, "nullus clericus nisi causidicus" (*t*).

Ancient office of chancellor.

The chancellor—who was the highest subject in the realm, both in respect to his judicial and political functions—sometimes united with these sources of influence that of holding the chiefest rank to which a member of the clerical body could aspire.* The student has only to be reminded of those two ecclesiastics, whose ambition and greatness rendered them the objects of jealousy, even to the powerful monarchs under whom they respectively lived—namely, Thomas A'Becket, Archbishop of Canter-

(*s*) *Vide* Hicks' Dissert. 46.

(*t*) Reeves' Hist. of Eng. Law.

* From the reign of Henry II. to 21st of Henry VIII. the chancellors were generally ecclesiastics. The first common lawyer appears to have been Lord Rich, who was by the last-named monarch made chancellor.—Duck, *De usu et auctor.* 29. Under Queen Mary, Bishop Gardiner became lord chancellor.

CHAP. I.

bury, Chancellor to Henry II.,—and Cardinal Wolsey, whose history unites itself almost inseparably with that of Henry VIII.,*—and he will have no difficulty in accounting for that vast influence which, with their predilections and previous education, the clerical chancellors exercised in amalgamating the principles and doctrine of the civil law into that system which we now recognize as the common law of the land. The reason why the common law judges, in subsequent times, did not more frequently apply to the imperial law for direction was, it seems, because the judges, aided by the legislature, had erected such a system of jurisprudence out of those sources before alluded to, as to render further reference to the Roman civil law no longer necessary (*u*); moreover, when the prerogative of grace, originally inherent in the sovereign, was by Edward III. referred to the chancellor, and the Court of Chancery became established upon a foundation which rendered an application to the Roman law less frequent and necessary, a greater confidence began naturally to be engendered towards a tribunal which experience soon taught provided a more perfect remedy than any other court of judicature, and thus gradually to silence all opposition from the judges of the common law, whose legal acumen, and superior station, would be most likely to detect any violation of

* "It is thought that this court of equity began under Henry Beaufort, son of John of Gaunt, that great Bishop of Winchester, afterwards cardinal in the reign of Henry V. and in the beginning of Henry VI., and increased while John Kemp, Bishop of York and Cardinal, was lord chancellor in the 28th year of Henry VI.; but it increased most of all when Cardinal Wolsey was lord chancellor of England, anno 8 Henry VIII., and continued until the 21st year of the same king; of which the old saying was verified, 'that great men in judicial places will never want authority.'"—4 Inst. 553.

(*u*) Spence, Eq. Juris. 126.

those principles which the very existence of a court of equity was intended to enforce.

Progress of the Court of Chancery.

Great indeed must have been that power which, depending upon the mere grace of the sovereign, could, amidst the jealousy of our ordinary judges, who were taught to regard the principles of the common law as the perfection of reason, establish an almost paramount and independent jurisdiction in our country; a jurisdiction which did not scruple to adopt both the maxims of the prætorian law of Rome and the common law of England, so far as they accorded with the strict claims of justice, but throwing them aside whenever they interfered with those claims. Being once established, however, the courts of equity, by an application of their own flexible rules of practice, were often found acceptable in moderating the severity of the ordinary tribunals, and supplying their deficiency when a rigid adherence to those maxims which fettered their proceedings would have resulted in oppression and injustice. But, notwithstanding the suspicion manifested by the judges who presided over our common law tribunals, and the opposition it encountered from the barons of the realm (*v*), the Court of Chancery, sanctioned by the great council of the nation, increased in power: for, amidst the stormy and unsettled scenes which marked the early period of our history, there was found no other tribunal sufficient to redress those instances of outrage and rapine, whose frequent occurrence required the prompt and energetic interference of some court of competent authority, possessing internal resources sufficiently available to render a certain and salutary protection to the parties aggrieved.

The exclusive power of causing a party complained of to appear and answer in person upon oath instead of appearing and answering by attorney as at common law—

(*v*) Duck, De Usu, 26.

CHAP. I.

its preventive jurisdiction for restraining a threatened grievance,—and its power of giving compensation in cases where the ordinary tribunals could only punish criminally,—rendered the Court of Chancery a place of resort for all persons against whom the courts of ordinary jurisdiction were virtually closed.

The Court of Chancery a distinct tribunal.

By these means the Court of Chancery, about the reign of Richard II.,* became established as a distinct tribunal, governed by its own rules and maxims, partaking largely of those principles of equity and conscience which the system of Roman law afforded, and to whose fountains the judges had a constant access in any case of doubt and uncertainty (*w*).†

* Hardy fixes it some time in Edward III.'s reign.—Introd. to Close Rolls, 28.

(*w*) Spence, Eq. Juris. 345.

† Lord Coke, Artic. sup. Char., says that "the first decree in Chancery made by the chancellor was in 17 Richard II. (Rot. Parl. 17 Richard II., no. 10), when John of Windsor complained in Parliament against Sir Richard le Scrope, requesting to be restored to certain manors in Cambridgeshire, which were adjudged and ordained to him by the king's award, then being in possession of Sir J. Lisley, and then withholden by Sir Richard le Scrope, who, by champerty, bought the same. The Parliament compromitted the matter to the king's order and award: the king committed the same to his council; who, upon hearing the same, adjudged the matter in dispute for Sir John de Windsor under the privy seal, and sent a warrant to Arundel, Archbishop of Canterbury, then chancellor of England, to confirm the king's award, made by advice of his council, who confirmed it by decree, and granted an injunction under the great seal against Sir John Lisley."—4 Inst. 553.

The distinction between the two jurisdictions of equity and law in administering relief, soon became, after a certain fashion, generally felt and acknowledged throughout the nation: at any rate it could not fail of being observed and seized upon by some of our quaint, deep-thinking, and, withal, graphic divines of the puritan school, for the sake of illustrating a point, or giving force to the argument. Hence Thomas Adams, a puritan conformist divine, in

Amidst the attempts, on the people's part, to subvert the equitable jurisdiction of the Court of Chancery, their greatest rancour appears to have been levelled against the writ of *subpœna*.* "The general distaste," says Mr. Hardy (*x*), "exhibited by the Commons, in their petitions, during several years after the first use of this writ, was remarkable; and their feelings on the subject may be estimated by the uncourteous way they spake of the framer of the writ."†

Writ of subpœna: how regarded.

From the reign of Edward IV. the Court of Chancery appears to have proceeded by degrees to strengthen, if not to enlarge, its jurisdiction, without any further interference with its authority, whatever secret feelings of hostility might remain against its existence; for both the Council and the Chancery had become engrafted in

Court of Chancery increases in strength.

one of his sermons, during the early part of the reign of James I., addressing the natural man, has the following:—"Lo, now the witnesses (thy conscience and thy life): thou art gone at the common law of justice; it is only the Court of Chancery that must clear thee."—Sermon on the Three Divine Sisters.

* "The process of the great seal was by *subpœna*, and sometimes by *hab. corp. coram consilio*, or *coram consilio in cancellariâ*; and these processes were returnable, for the most part, in Chancery; yea, in cases where the cause was depending singly, *coram consilio*." —Hale's Jurisd. H. of Lords, 44.

To show the superiority of the Court of Chancery beyond that of any other tribunal, the method of summoning a person before each has not been overlooked: *e.g.* the party was required to appear coram *rege* et *consilio*, when he was summoned to the Council or the Star Chamber; but when his appearance was required in Chancery, it was sometimes *coram rege* only, without the adjunct *consilio*.—St. 1 Ed. III., cap. 9. Append. to Ch. Rep. 13:—"But for a truer mark of superiority, the chancellor is *secundus à rege*. The teste of the Chancery is *meipso*, whereas the teste of the King's Bench is *J. B. Milite*."

(*x*) Introd. to Close Rolls, 30.

† "Item priont les Communes," etc. (from MS. taken from Hardy, 30. Rot. Parl. 3 Hen. V.)

CHAP. I.

the constitution itself (*y*); thus, to offer opposition to the one might have been construed into a species of treason against the other. Little alteration, however, was effected in the practice and authority of either the Council or the Court of Chancery from the above period until the reign of Henry VIII., when the separation took place between the Privy Council and the Star Chamber; which latter court had, at that period, acquired considerable celebrity, by reason of the extent and authority of its jurisdiction, although it had not attained its full maturity until the reign of Elizabeth.

Indeed, it can be no matter of surprise, that a court, thus established, and unfettered by maxims which owed their origin, in a great measure, to our feudal system, should take advantage of every opportunity to give evidence of its utility, by applying a remedy in those cases where either the ordinary tribunals were silent, or even, if they did recognize a right, were, from circumstances, incapable of affording a perfect remedy, and where therefore there was a call for some extraordinary interference, either from the sovereign himself, or some power especially delegated by him. As to those cases of fraud, covin, circumvention, accident or mistake, and other matters relating to conscience and faith, the English common law system was extremely defective in applying relief.

Benefit of Roman civil law in regulating the Court of Chancery.

The judicial system, as organized at Rome, and which we have received from the Corpus Juris Civilis, offered us two methods for filling up that which was wanting in our own practice. "The one was," says Mr. Spence, "for the chancellor to supply the deficiency of the law, by introducing a *jus honorarium*, to be administered by the courts of law; the other was to resort to the prerogative in each particular case where no remedy, or an inadequate remedy, was provided by law" (*z*): although such an

(*y*) Palg. Com. (*z*) Eq. Juris. 325.

exercise of the prerogative by any general regulations was excluded; for it required the assent of the great council, since no new writ could be found to issue but by the king and his council.

Antiquity of the equitable tribunal.

The idea of a court of equity, as one of appeal from inferior tribunals, seems to have been no new thing; for, as we have said, during the Saxon dynasty, independently of the king's select committee, and of the great council assembled for the purpose of legislature, the king, as the fountain of justice, was wont to hear and determine matters referred to him upon principles of equity, in cases where the strict rules of the common law would have been too oppressive (*a*); the ecclesiastics being in those times the instigators and promoters of such a system: and, as the chancellor was employed to make out the royal charters and precepts, the task also of mitigating or supplying the deficiency of the positive law was sometimes expressly delegated by the king to the chancellor in his court, and thus the extraordinary jurisdiction, even at that early period, began to be shadowed forth in the Court of Chancery.

Judicial system before and after the Conquest.

The general eruption which followed the Norman Conquest did not, so much as might be imagined, disturb the arrangement of our judicial system. The different courts of ordinary jurisdiction, which had been established or encouraged under the Saxon kings, continued after the same order, and were governed by the same rules, under the Norman dynasty (*b*). The king was considered the fountain of law, and the head of all judicial authority; for, even in periods long before the Conquest, the kings were taught, through the influence of the clergy, to

(*a*) "Si jus nimis severum sit, alleviatio deinde quæratur apud regem, et nulla mulcta culpæ pecuniaria superat æstimationem capitis."—Anc. L. tem. Edg. Wilk. p. 77.

(*b*) Hale's Hist. C. L. lib. ii. c. 5.

CHAP. I.

assume (not unwillingly) the titles, together with the rights and prerogatives, which they had borrowed from imperial Rome(*c*): whilst the sovereigns in their turn showed themselves by no means ungrateful to their spiritual guides, loading them with privileges and grants corresponding with their services. This mutual understanding, and reciprocity of kindly services between the king and the clergy, continued in unabated force until such a period of our history as it would be a matter of delicacy to particularize.* We find also among the most

(*c*) Duck, 17.

* It is rather surprising, when we consider the unsparing and vainglorious epithets that were heaped upon the monarchs of former days by an obsequious clergy, among which appear titles like the following,—*Christi Vicarius*, *Dei Vicarius* (Wilk. 113, tem. Æthelb.),—implying thereby the divine right of kings, the same compliment was forgotten to be awarded to the authors themselves until the reign of Elizabeth, when the Church was reminded of its negligence in this particular by Bancroft, the archbishop's chaplain (afterwards Bishop of London), who, in a sermon preached at St. Paul's Cross, January 1st, 1558, first publicly broached the notion respecting the right divine of bishops. The idea might probably have had its germ in some of the olden writers, who show that in certain proceedings the King and the Church went hand-in-hand. One of the laws of King Edgar has the following commencement:—"Jubeo ego et archiepiscopus," etc.—Wilk. 79. "*Dominus papa* videlicet in *rebus spiritualibus* quæ pertinent ad sacerdotium et sub eo archiepiscopi, episcopi, et alii prælati inferiores. Item *in temporalibus* sunt imperatores, reges, et principes in iis quæ pertinent ad regnum."—Brac. f. 5.

In one of those persecutions which raged against the non-conformists during the reign of Charles II., we are told that the pulpits resounded with the doctrine of passive obedience and non-resistance, which was now universally preached. The clergy seemed to make it their business to surrender to the king all the liberties and privileges of the subject, and to leave them only an unlimited obedience. "According to the principles publicly preached," says Rapin, "no Eastern monarch was more absolute than the King of England.

prominent members that composed the king's council, appeared the higher dignitaries of the Church, who exercised a vast influence in the Great Council also, and who, by reason of their ordinary pursuits, as well as their skill in the science of jurisprudence, were in general requisition whenever new laws were about to be framed having for their object the civil rights of the people.

Council: Great and Privy.

Among other remnants of Anglo-Saxon origin that survived the Conquest, for judicial and political purposes, were, as before noticed, the *Council*, which generally attended the royal person, and formed a kind of standing retinue of legal and political advisers during his progress throughout the kingdom. There was also the Great Council, which subsequently became distinguished by the name of Parliament; so called in contradistinction from the select or Privy Council; although, when sitting for public business, it embraced each member of this latter council also, in his individual capacity; the king himself presiding over both assemblies (*d*). The king's ordinary or Privy Council (the usual style by which it was distinguished from the reign of Edward I.) appeared, according to the opinion of Mr. Hallam (*e*), no other than the ancient *curia regis;* since it had, in a principal degree, the like objects of deliberation, and was composed of the same persons, consisting of the chief ministers: these were the chancellor, the treasurer, lord steward, lord admiral, lord marshal, the keeper of the privy seal, the chamberlain, treasurer and comptroller of the household, the chancellor of the exchequer, the master of the wardrobe, and also of the judges, the king's serjeant and attorney-general, the master of the rolls, the justices in eyre—

This doctrine was supported in the courts of justice by all the judges and lawyers, to the utmost of their power."—Hist. of Eng. ii. b. 23. 725; Neale's Hist. of the Puritans, iii.

(*d*) Hallam, Mid. Ages, iii. 213; Palg. Counc. 20.

(*e*) Mid. Ages, iii. 205.

CHAP. I.

who were not at that time the same as the judges at Westminster. When these were called together, it was a full council; but when the business was of a more contracted nature, those only who were fittest to advise were summoned; the chancellor and judges, for matters of law; the officers of state, for what concerned the revenue or household.

The king, the fountain of justice.

When Henry II. established a judicial tribunal, as the *curia regis* (*f*), the prerogative of finally deciding the law, and of invoking, when needful, the aid of the council, was reserved to him, as the fountain of justice and equity. In succeeding reigns, however, the kings, by reason of their more active engagements in war, or from a disinclination to fix themselves down to the onerous duties of superior judge, resigned those responsibilities to others whose pursuits and peculiar studies rendered them fitter to discharge that office. The select committee was, therefore, the body to whom these duties were assigned: "In it," says Sir M. Hale, "there was lodged the plenitude of all civil jurisdiction" (*g*). At the head of this *consilium sapientium regni* was the chancellor; for, as he was the king's principal chaplain and confessor, he was supposed to be possessed of a more intimate acquaintance with the king's will and pleasure than any other dignitary; hence he was called the keeper of the king's conscience (*h*).*

Chancellor, the lord keeper.

Description

"The chancellor," says Lord Ellesmere, in his some-

(*f*) Benedict Abbas, 266. (*g*) Jurisd. of the House of Lords, 96. (*h*) Selden's Off. of Lord Chanc., sec. 3.

* The Select Council often commented severely on the decisions of other courts, and often proceeded to the execution of justice in the first instance, without the assistance or advice of the other branches of government;—"and well it might," says Sir M. Hale, "as it was not only composed of the wisdom of the nation, but also of the great officers of state. The chancellor, treasurer, justices of each bench, and barons of the exchequer, all active members of it, assisting with their knowledge and advice the less experienced."—Hardy, Pref. 26. Rotu. Lit. Chan.

of the chancellor; his functions.

what quaint and figurative style, "is generally the mouth, the ear, the eye, and the very heart of the prince; so is the court, whereof he hath the most particular administration, the oracle of equity, the storehouse of the farm of justice, of the liberality royal, and of the right prætorial, which openeth the way to right, giveth power and commission to the judges, hath jurisdiction to correct the rigour of the law by the judgment of equity and grace. It is the refuge of the poor and afflicted. It is the altar and sanctuary for such as, against the right of rich men and the countenance of great men, cannot maintain the goodness of their cause and truth of their title; the entry and door whereof ought *patere omni postulanti omnibus horis, nulli tamen hiare*, which is meant not to gape after such men as bring rewards, or such access to the help thereof by corruption" (*i*).

Destruction of the *aula regia* increases the chancellor's power.

According to Blackstone (*j*), when the *aula regia* was broken to pieces, there existed no idea of a court of equity, as distinguished from a court of law, in the original plan of partition; for, though equity is mentioned by Bracton (*k*), as a principle in opposition to strict law, yet neither in his writings, nor in those of Glanvil, nor Fleta, is there any word mentioned respecting the equitable jurisdiction of the Court of Chancery. He conceives it, therefore, to be a probable conjecture that when the courts of law, proceeding merely upon the ground of the king's original writs, pronounced a harsh or imperfect judgment, application for redress used to be to the king in person, assisted by his Privy Council. These were wont to refer the matter of complaint either to the chancellor or a select committee, or by degrees to the chancellor only, who, upon weighing the merits of the case, mitigated the severity, or supplied the defects, of the judgment at law.

(*i*) Observations, 21.
(*j*) Comment. b. iii. 50.
(*k*) Lib. ii. cap. 7, fo. 23.

CHAP. I.

Select Committee, or Privy Council.

With respect to the Select Committee, or Privy Council—the organ of the king's executive authority—its constitution appears to have been twofold: its deliberative office, for advising with the king; and its decisive power of jurisdiction. The former comprehending all subjects of political deliberation referred to it by the king, as the governing council of state. In virtue of these departments, there were also many petitions presented by aggrieved parties for advice; which the Council either transmitted by indorsement to the proper courts—the Chancery or King's Bench,—or directed the suitor as to the remedy he ought to seek; others were reserved to be heard "before the Council," and so indorsed;* whilst some which related to the king's interest were referred to the Chancery, or to select persons of the Council. The other branch of the constitution of the Privy Council,—namely, its decisive power, or, in other words, its coercive jurisdiction, was divided into acts, both legislative and judicial; under the former were many ordinances made, which had not the effect of an Act of Parliament; and it appears from the petition of the Commons, xiii. R. 2 (*l*), that no ordinances were valued which were contrary to the common law or statutes of Parliament. The judicial power of the Council was, in some instances, founded upon particular Acts of Parliament, empowering it to hear and determine certain causes: but, it would seem, that, independently of this delegated authority, the king's council exercised, as well out of Parliament as in

* Several entries on the Close Rolls, containing petitions, and the answers of the Council as written on such petitions, of which the originals are preserved in the Tower, are as follows:—"Sue at common law," "Sue in the Exchequer," "Sue in Chancery" (*i. e.* before the ordinary jurisdiction of that Court), "A writ on the subject shall be dispatched out of Chancery," "The king will consider," etc. —Hardy's Introd. to Close Rolls, 26, pref.

(*l*) Rot. Parl. iii. 266, no. 30.

it, a most extensive jurisdiction, both as to criminal and the right of deciding upon civil causes (*m*); although this stretch of power was, by the Hampdens of those days, regarded as an encroachment upon the common law, and a violation of the benefits given to them by Magna Charta, in one of its most important articles,—namely, the right of trying questions relating to property by peers. This occasioned two statutes to be passed by Edward III.; one in the fifth year (*n*), the other in the twenty-fifth year, of that monarch's reign.

Jurisdiction of the Privy Council concurrent with that of the Court of Chancery.

The civil jurisdiction of the Council was, for the most part, in after-times, exercised conjointly with the Court of Chancery; for, as the proceedings before both tribunals professed to be conducted upon equitable principles, that court, which was essentially a court of equity, supplied the Council with its rules and maxims, when the latter tribunal was called upon by virtue of its appellant jurisdiction to determine those cases referred to it from the courts of common law; and the Chancellor being entrusted with the custody of the great seal, the *Consilium Regis* generally adopted their process from it (*o*). Ac-

(*m*) Hallam, Mid. Ages, iii. 208.

(*n*) "Also it is recorded and established, that no man from henceforth shall be attached by any accusation, nor forejudged of life or limb, nor his lands, tenements, goods nor chattels seized into the king's hands against the form of the Great Charter."—5 Edward III. c. 9; Rot. Parl. ii. 228, No. 16.

"That none shall be taken by petition or suggestion made to our lord the King, or to his Council, unless it be by indictment, or presentment of the good and lawful people of the same neighbourhood where such deed be done, and in due manner, or by process made on writ original at the common law; nor that none be put out of his liberty nor of his freehold, unless he be duly brought into answer, and forejudged of the same by course of law; and, if anything be done to the contrary, it shall be redressed and holden as void."—25 Edward III. st. 5, c. 4; ibid. 239, No. 19.

(*o*) Hale's Jurisd. of H. of Lords, 44.

CHAP. I.

cording to the opinion of Sir F. Palgrave, the first outline of the Court of Chancery was borrowed from the Council, and the authority of the chancellor was strengthened by continued delegation from the Council (*p*).

Council exercises itself in matters both civil and criminal.

The judicial business of the Council, as before remarked, exercised itself both in criminal and in civil matters. Its interference in the former branch of jurisdiction appears to have originated in those cases of oppression and outrage too characteristic of that early period, and which the ordinary tribunals were incompetent to relieve, and especially when the rank or position of the offending party presented an obstacle to a fair determination of the question of right; and, as much tyranny and injustice might be endured by the poor from their more powerful and opulent neighbours, in those loose and distracted times, when the ordinary arm of justice was but feebly stretched forth, the Privy Council seems to have taken the cause of the poor under its peculiar protection: hence the imposing invocation that terminated most of their petitions —"for God and in work of charity," or "at the reverens of God and in the way of charitie" (*q*)—found, as far as practicable, a seasonable response from the remedial functions of the criminal side of the Council.*

Habeas Corpus.

Of no little importance also was the writ of *habeas corpus cum causâ;* which issued whenever a party was imprisoned under the process of an inferior court: it was made returnable in Chancery, in order that the defendant

(*p*) Counc. 95. (*q*) Palg. Counc. 81—94.

* "Item—that the clerc of the Counsail be sworn that, every day that he the Counseill sitteth on ony billes betwyx partie and partie, shall, as far as he can, aspye which is the porest suytur's bille, and that first to be redd and answered; the king's sergeant to be sworne, trewly and plainly, to yeve the poor man, that for suche is accept to the Counsail, assistense, and trewe counsaill in his matere so to be suyd, wythoute any good takyng of hym, on peyne of discharge of ther offic'."—Rot. Parl. 2 Henry VI. 201.

might be dealt with by the superior authority of the Council.* This process was issued by virtue of the powers of that branch of the court which comprised what may be termed the mixed jurisdiction of the chancellor. A defendant, arrested upon any obligation or bond, extorted by fraud or duress, was relieved by this writ, when the nature of the instrument could be examined and investigated (*r*). The power of issuing writs also into all special jurisdictions or franchises, as Wales and Ireland, together with other exclusive rights, tended to increase the extraordinary jurisdiction of the Council to an extent far beyond the powers that were incident to any other court of law: of this important exercise of jurisdiction, the Court of Chancery (being conjoined with the civil proceedings of the Council, and usually named together in the same petition) frequently in a large measure partook.

Civil business of the Council.

As to the other branch of jurisdiction,—namely, the *civil* business of the Council,—it extended itself to such matters also as were not within the reach of the inferior courts of common law, and which form no inconsiderable

* Palgrave gives a description of two bills, or petitions, presented to the Council by persons in very different ranks of life. The one is by John Rukke, husbandman, of the town of Monteneys (Moutte), in Essex, falsely imprisoned, and forcibly disseised of his tenement, against all right and conscience; upon which a double remedy was afforded—a writ of *habeas corpus cum causâ*, returnable in Chancery, and a subpœna, returnable before the King and Council. The other was by John, Lord Strange: Roger Kynaston, the second husband of the Lady Elizabeth, the widow of Richard, Lord Strange, and mother of the complainant, unlawfully retaining possession of certain lordships in Shropshire, Wales and the Marches, in which the Lady Elizabeth (then deceased) had only a life estate. His ordinary remedy was at law; but the power of the disseisor induced the plaintiff to bring his suit before the Council.—Counc. 90.

(*r*) Palg. Counc. 96.

CHAP. I.

part of the chancellor's judicial functions at the present day; such as matters of fraud, covin, deceit, and dishonesty; to which also may be added the prerogative writ of *ne exeat regno*, issued against foreigners seeking a departure to avoid their just debts (*s*): and, after the various branches of the common-law jurisdiction became separated into as many distinct courts, about the time of Henry III., all questions relating to breaches of faith (*fidei læsiones*), and oaths (*juramenti transgressiones*), and also affairs of trust, which had been granted to the clergy by Richard I., as matters for their peculiar cognizance (*t*), were, with the exception of the probate of wills in personal estates, taken away from the ecclesiastical courts, and thenceforth could only be relieved against by petition to the King in Council; which branch of jurisdiction subsequently fell into the exclusive province of the Court of Chancery. From the early part of the reign of Richard II. to the end of Edward IV., in which interval the practice of the Council was conducted with great regularity, in cases of misdemeanor, the parties brought before the court were generally examined *ore tenus*, and frequently without having any bill or articles exhibited to them: the offender does not even appear to have been sworn, for the purpose of verifying his answer; but he was sometimes subjected to an oath, as a bond upon his conscience (*u*).

Method of procedure peculiar to the Court of Chancery.

After the Court of Chancery became established as an independent and distinct jurisdiction, it still retained its own peculiar mode of procedure, which it had exercised in conjunction with the Council; although, probably, its entire separation from the Council was not effected until a subsequent period. From the reign of Henry VI., the jurisdiction of the Chancery Court, although very exten-

(*s*) Palg. Counc. 37. (*t*) Glan. 10, c. 12; Bracton, 175 a.
(*u*) Palg. Counc. 86.

sive, became more especially resorted to for the purposes of affording relief against fraud, deceit, or force; for it was now that the court had arrived at its full development, in all its branches of judicature, and bills began to be filed; suits were also instituted for perpetuating the testimony of witnesses: the examination, being taken by commission, was certified in Chancery. Possession of property, the subject of litigation, was enforced under the authority of the court; and every other case of a similar character was cognizable under its ample jurisdiction (*x*).

The writ of subpœna disliked by the people.

It was during the fifteenth year of the above-named monarch's reign that the people, either from a national jealousy of the growing influence of a jurisdiction distinct from the common-law tribunals, or an instinctive horror (even in those days) of the Court of Chancery, renewed their remonstrances respecting the obnoxious subpœna, when they were promised that no such writ should thenceforth be granted, until surety be found to satisfy the party so vexed for his damages and expenses. No further complaint, of which we have any record, was afterwards made by the Commons against the growing power of the equitable jurisdiction; and, in the seventh of Edward IV., when Robert Kirkham, Master of the Rolls, had the great seal delivered to him by the King, a memorandum was entered on the Close Rolls of that year as follows: "And over this the King willed, and commanded, there and thenne, that all manere of maters, to be examyned and dyscussed in the Court of Chauncery, should be directed and determined accordyng to EQUITE and CONSCIENCE, and to the old cours and laudable custume of the same Court; so that if, in any of such maters, any difficultie, or question of lawe, happen to ryse, that he herein take th' advis and counsel of sume

(*x*) Palg. Counc.

CHAP. I.

of the kynge's justices, so that right and justice may be duely ministered to every man."

Court of Chancery increases in power and importance.

"From this time," says Mr. Hardy (*y*), "the jurisdiction of the Court of Equity went on smoothly, and the chancellor daily acquired additional power and importance, transacting everything *vice, nomine, et loco regis*, and deciding causes by the rules of his own conscience: in fact, he had become sole judge in matters of equity, and almost possessed *potestatem absolutam*."* There is, however, abundant evidence to show that, although the Court of Chancery might be allowed to exercise its general power in matters which come within its equitable or extraordinary jurisdiction without any popular complaint, there were cases wherein its interference formed the source of continual bickerings and jealousies between the chancellor and the common-law judges. These contentions arose by reason of the power which the Court of Chancery assumed, of arresting and controlling by injunction (*z*) the business of the ordinary tribunals, not

(*y*) Introd. xxxi.

* "A l'époque où les tribunaux furent divisés et rendus sédentaires, le chancelier s'était arrogé le droit de juridiction autrefois réservé au roi et à son conseil."—Lettres sur la Chancellerie, etc., par M. C. P. Cooper, 164, ed. 1828.

The reason is evident, when we consider that, for a considerable period after the authority of the Council had been established, petitions were still directed to the king, as the fountain of *justice* and *equity*; but these were, in almost all instances, referred to the Council, which, in its turn, handed them over to the chancellor: and, notwithstanding the *Concilium Regis* continued for more than three centuries a separate and independent body from the *Commune Concilium*, until, in process of time, it became superseded by the Court of Chancery, yet the people found it more convenient to address their petitions in the first instance to the chancellor, being well aware that they would be ultimately referred to him.

(*z*) Append. to Ch. Cas. temp. Car. I. and Car. II., 14. *Vide* some of the cases of injunction. Sir H. Seton, Early Rec. 131.

only during mesne process, but even after judgment, whenever an irreparable hardship, but for such interference, might ensue; for whenever a judgment has been obtained by oppression, wrong, and a hard conscience, "the chancellor," says Lord Ellesmere, "will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party"(*a*). Hence the Court of Chancery had to contend with much opposition from the courts of King's Bench, Common Pleas, and Justices in Eyre, from the reign of Henry VI. to that of James I., who, upon certificate of Sir F. Bacon, A. G., and others, that the practice of granting injunctions after judgment had been of long continuance, ordered that the ancient practice, as so certified, should continue.

Opposition of common law judges to Court of Chancery.

In following the Court of Chancery, as a court of equity, up to the time when it had established itself as a jurisdiction independent and distinct from the Council, it follows, almost as of course, to take some notice of two other branches of the Council, which also became in a measure separate tribunals—*i. e.* the Star Chamber and the Court of Requests.

Origin of Star Chamber.

The Court of Chancery formerly entertained a jurisdiction over criminal matters similar to that exercised by the Council. The chancellor was empowered, by the 2 Henry V. st. 1, cap. 9, to issue writs of proclamation, in cases of bloodshed and murder. This power was further extended by st. 33 Henry VI. cap. 1; and in such cases where any special writ was required, the application was made to the chancellor by bill or petition. The jurisdiction of the court, embracing matters of fraud or outrage, and all breaches of equity and good conscience, formed a foundation for a system of equity in civil suits. During the reign of Edward III., the Council used to

(*a*) Earl of Oxford's Case, 13 Jac. 1; 1 Ch. Rep. 1.

CHAP. I.

hold their meetings in the Starred Chamber, for the dispatch of business. "In the twenty-eighth year of the reign of that king," says Lord Coke, "it appeared that the returns *coram nobis* were in three manners:—(1) *Coram nobis in Camerâ* (*Camerâ Stellatâ*); (2) *Coram nobis quicunque fuerimus in Angliâ*, which is the King's Bench; and (3) *Coram nobis in Cancellariâ*" (*b*). In the course of time, a portion of the business relating to civil rights was, by the Council sitting in the Star Chamber, assigned over to the chancellor as matter fitter for his adjudication; the Council reserving to itself jurisdiction over the remainder of the business. The Court of STAR CHAMBER had now acquired its distinctive name; when an Act which was passed in the reign of Henry VII. gave it additional authority, in cases of oppression, and other exorbitant offences of great and influential men, "when," according to the words of Lord Coke (*c*), "inferior judges and jurors, though they should not, would, in respect of their greatness, be afraid." The offences punishable by the Star Chamber were bribery, extortion, maintenance, champerty (embracing forgery, perjury (*d*), dispensers of false and dangerous rumours, news, and scandalous libelling (*e*)), false and partial misdemeanors of sheriffs (*f*) and bailiffs of liberties, fraud, deceits, great and horrible riots, routs, and unlawful assemblies, single combats, challenges, duels, and other heinous and extraordinary offences and misdemeanors; but ordinary and such offences as might have received sufficient and condign punishment by the courts of common law, the Star Chamber did not interfere with. By the 21 Henry VIII. cap. 20, the president of the Council, an officer then re-

(*b*) 4 Inst. 60.
(*c*) 4 Inst. 63.
(*d*) Spicer *v.* Read, Hob. Rep. 62.
(*e*) Barrow *v.* Llewellyn, ibid.
(*f*) Park *v.* Percival, ibid.

cently created, was associated to the chancellor, the lord treasurer, and the lord privy seal.

Proceedings in the Star Chamber: how taken.

The proceedings in the Chamber were by bill or information, by examination upon interrogatories, and by examination of witnesses, and rarely *ore tenus*, upon the confession of the party under bond, which he again was obliged to confess freely in open court; and it would seem that the signature of counsel was as necessary to the written pleadings as it is to the bill and answer in Chancery at the present day: hence it was one of the misfortunes of Prynne, who had been previously disbarred, and his friend Bastwick, upon their Star Chamber prosecution, that, after their answers were drawn, no counsel, out of a dread of that tribunal, could be found sufficiently courageous to sign them.* The various pleadings were under the great seal; the process was by subpœna, attachment, commission of rebellion, etc. The punishment which the court awarded was the pillory, papers, whipping, loss of ears, tacking of ears, *stigmata* or branding in the face, etc. "It extendeth not," says Lord Coke, "to any offence that concerns the life of a man, or obtruncation of any member, the ears only excepted, and those rarely, and in most heinous and detestable offences."

Beneficial influence of the jurisdiction of the Star Chamber, when not abused for state prosecutions.

Notwithstanding the Court of Star Chamber in after-times fell under the just odium of an injured and insulted nation, by reason of its unconstitutional tyranny, and its subserviency to the jealous policy of arbitrary power,

* Prynne and Bastwick, having no other alternative, left their answers at the office, signed with their own hands; but were, nevertheless, proceeded against *pro confesso*. Burton, a clergyman, another of the defendants, prevailed with Mr. Holt, a bencher of Gray's Inn, to sign his answer; but the court ordered the two chief justices to expunge the whole answer, except six lines at the beginning and three or four at the end: which that gentleman not submitting to, his answer was also taken against him *pro confesso*.—Neal's Hist. of the Puritans, vol. i. 595, 4th ed.

CHAP I.

there did exist a period, of some duration from its first creation, when the greatest benefits resulted from the exercise of its jurisdiction. For a considerable time after the middle classes had begun to emerge from a state of vassalage into freedom, and, by a gradual increase of commercial adventures, were enabled to exchange their condition of servile dependence for comparative affluence and importance, they were but ill defended by the common law courts from the power and influence of the nobility, who had probably witnessed, with no little jealousy, the distance between themselves and that class becoming gradually narrowed, as mercantile daring and successful industry increased. The trial by ordinary juries was incapable of withstanding the bribes and menaces of the great; and hence jurymen became proverbially corrupt. Thus it was necessary that some such a tribunal should exist, before whom the distinctions of birth and rank might afford no protection. It would be unjust, therefore, in estimating the summary and authoritative manner in which offenders were dealt with under the coercive jurisdiction of the Court of Star Chamber, not to take into the account also the lawless state of society at that period, and the comparatively impotent condition of the ordinary courts of judicature, wherein the judges themselves and the inferior officers were overawed by the rich and powerful nobles. The courts of law, it is true, if left to the free exercise of their functions, provided for the redress of every species of spoliation and outrage; but its judges, either by reason of intimidation or undue partiality to the stronger party, "though they should not be" (to repeat the words of Lord Coke), were reluctant to enforce the claims of justice. The civil wars, which for so many years distracted the country, down to the reign of Henry VII., —together with their invariable attendants, lawless

Insufficiency of the law courts against the influence of the nobles.

violence and plunder,—contributed in no slight degree to render nugatory every attempt, through the ordinary channels of justice, to stem the evils which everywhere abounded. Under such a state of circumstances, the weak and unprotected would naturally look up, with a certain degree of confidence, for redress to the only tribunal that presented itself to curb the proudest noble, and overawe with its august presence the most licentious and reckless offender.

Star Chamber at its zenith, tem. Elizabeth.

The Star Chamber is supposed to have arrived at its full maturity in the reign of Queen Elizabeth (*g*); and, except in political affairs, justice was administered with discretion and impartiality; for, to use the words of Lord Clarendon, "whilst it was gravely and moderately governed, it was an excellent expedient to preserve the dignity of the king and the peace and security of the kingdom." As we have before observed, many a source of grievance and oppression existed, which called loudly for the coercion of some authoritative and inquisitorial tribunal; but, in spite of the learning and integrity and sound intelligence of some of the judges in the upper courts of law, the course of justice became corrupted at its fountain; and the very legal technicalities of those courts, instead of protection, became, in too many instances, the instruments of chicanery and wrong, especially in the courts of inferior jurisdiction at that time dispersed throughout the land. At such a crisis, therefore, the Star Chamber (that tribunal which governed the whole kingdom) was the only refuge in which the suitor could hope to obtain a certain and full relief; and, until this court had degenerated into a state engine, and perverted its vast capabilities, for the sake of carrying out the arbitrary measures of government, it existed rather as a protective than as an oppressive power. We are

(*g*) Palg. Counc.

CHAP. I.

familiarly acquainted with the most odious abuses of its authority, when the Star Chamber turned its energies to the punishment of state offences, during those feverish times in which the claims of political rights and freedom of conscience were waging a fierce warfare against kingly prerogative and episcopal hierarchy; but we seldom call to mind its utility and moderation in its more healthy existence: from such memorials, however, of this tribunal as have been transmitted to our own times, it appears that between party and party it administered impartial justice.

Refuge for the inferior suitor.

"If," says Sir F. Palgrave, "the Court of Star Chamber was despotic, yet, nevertheless, it afforded an ample compensation for injuries: the Star Chamber curbed the justice and punished the gaoler; vexatious wrongs were easily and fairly redressed; and, except when the crown was concerned, the inclination of the court was generally in favour of the poor, the humble and the oppressed." The same writer conceives it probable that, among the causes which contributed to the final separation of the Council and the Star Chamber, the creation of the office of lord president was not the least operative, as it enabled the Privy Council more effectually to sever the discussion of state affairs from the administration of justice. The Privy Council, sitting as such at Whitehall and Greenwich, gradually abandoned its criminal jurisdiction to those of its own members who assembled at Westminster, in conjunction with the justices of either bench, and under the direction of the lord high chancellor. This court, however, in its struggles with the nation respecting the extent of its judicial authority, carried its usurpations to such a height during the reign of Charles I. as to overflow its boundaries, and thus complete its own dissolution: for, by an Act passed in the sixteenth year of that monarch's reign, c. 10, the Star Chamber, to-

gether with other jurisdictions of the same kind, were declared to be utterly abolished.*

Star Chamber and High Court of Commission, tem. Car. I. Archbishop Laud.

The Star Chamber and the High Court of Commission, during the reign of Charles I., according to the words of Neal (*h*), "exceeded all bounds, not only of law and equity, but even humanity itself." Urged on by Archbishop Laud (whose uncompromising severity towards all who, in the slightest degree in church and state affairs, incurred his displeasure, are matters of history), this court, under the prosecutions of Attorney-General Noy, became at last a reproach to the nation, and called loudly for its abolition. According to the testimony of Lord Clarendon, there were few persons of quality in those times that had not suffered or been perplexed by the weight and fears of its censures and judgments: for, having extended their jurisdiction from riots, perjuries, and the most notorious misdemeanors, to an asserting of all proclamations and orders of state, to the vindicating illegal commissions and grants of monopolies, no man could hope to be any longer free from the inquisition of the Court, than he resolved to submit to these and the like extraordinary courses (*i*).

* Sir F. Palgrave, in referring to the opinion of those who assert that, at the abolition of the Star Chamber, all that was good and salutary in its jurisdiction reverted to the Court of King's Bench, remarks that this idea is founded upon the notion that the Court of King's Bench represents the ancient Council, or *Curia Regis;* but "that Parliament, notwithstanding the great changes which have taken place in its construction, was, and is, the only tribunal to which that name can be applied. Parliament alone stands in the place of the *Curia Regis;* and all its remedial jurisdiction is in most cases exercised indirectly. It still exercises the functions of relieving or procuring redress when and where the common law has failed."—Counc.

(*h*) Hist. of the Puritans, i. 595.

(*i*) Hist. of Great Rebel. i. 499, 8vo.

CHAP. I.

Severity of the Star Chamber against Prynne, Bastwick and Burton.

The execrable cruelties which it inflicted on three of the learned profession,—Bastwick, Prynne (one of the most voluminous writers this country ever produced), and Burton,—who, while in prison under some former prosecution out of the court,* were supposed to have employed their time in writing against the bishops and their spiritual courts, can scarcely be credited, except upon the best authority. Without any form approaching the common decencies of a trial, the court, with the archbishop as their principal adviser, appeared as if they were determined to crush their victims, by excluding them from all opportunity of even making their defence: the prisoners at the bar cried loudly for justice, and requested that their answers might be read; but their request was peremptorily denied, and the following sentence passed upon them:—"That Mr. Burton be deprived of his living and degraded from his ministry, as Prynne and Bastwick had been from their professions of law and physic: that each of them be fined £5,000: that they stand in the pillory at Westminster, and have their ears cut off; but, as Mr. Prynne *had already lost his ears*, by sentence of the Court, in 1633, it was ordered that the *remainder of his stumps* should be cut off, and that he should be stigmatized on both cheeks with the letters S. L. (Schismatical Libeller); and all three were to suffer perpetual imprisonment in the remotest prisons of the kingdom." This sentence was

* Prynne's former incarceration was on account of his famous "Histriomastix," a work levelled against stage-players, containing more than one thousand pages. It was supposed to cast some reflections upon Henrietta, queen of Charles I., who not only attended the theatre herself, but also performed occasionally in the Court masques. These proofs, however slight, were sufficient in those days to form the ground of prosecution against any person who had proved such a scourge as Prynne had done by his never-ceasing pen.

executed upon them, June 30th, 1637: the hangman rather sawing off the remainder of Prynne's ears than cutting them off. They were afterwards removed to prisons in the islands of Scilly, Guernsey, and Jersey; where they were kept without use of pen, ink, or paper,* or the access of friends, till they were released by the Long Parliament. Laud thanked the court for their just and honourable censure of these ill-used men, and for the defence of the Church; but, because the business had

* It seems, however, that Mr. Prynne, to whom writing was more than his necessary food, must have contrived, at least by stealth, to procure pens, ink and paper; for, according to a modern author, notwithstanding the severity of his punishment, it was found impossible to silence him, "for he wrote away in prison as happily as if he had been in his chambers in Lincoln's Inn. It was in vain they removed him to the most distant castles—to Dunster, Carnarvon, Pendennis, and the Isle of Jersey—his works still came forth, dated from those places, in inexhaustible profusion."—Johnson's "Life of Sir E. Coke."

An account of this extraordinary person is thus given by A. Wood: "He may be well entitled Voluminous Prynne, as Tostatus Albulensis was, two hundred years before his time, called Voluminous Tostatus; for I verily believe that, if rightly computed, he wrote a sheet for every day of his life, reckoning from the time when he came to the use of reason and the state of man. His custom, when he studied, was to put on a long quilted cap, which came an inch over his eyes, serving as an umbrella, to defend them from too much light: and, seldom eating a dinner, would, every three hours or more, be munching a roll of bread, and now and then refresh his exhausted spirits with ale brought to him by his servant."—Wood's Athen. iii. 851, by Bliss.

To this circumstance Samuel Butler alludes, in the following verses:—

> "Thou, that with ale, or viler liquors,
> Didst inspire Wythers, Prynne, and Vicars,
> And teach, though it were in despite
> Of nature and the stars, to write."
>
> Hudib. p. 1, can. 1, v. 645.

CHAP. I.

some reference to himself, he forbore to censure them; leaving them to God's mercy and the king's justice! "This barbarous sentence," says Lord Clarendon, "disgusted the whole nation."

Court of Requests.

THE COURT OF REQUESTS had its origin from the Privy Council, like that of the Star Chamber, to which it bore some analogy, both as to its nature and its jurisdiction, and formed another off-shoot from the Council. It was established as a court of equity, for the purpose of granting redress to poor suitors, and such who, anciently, by supplication made plaint to the king, and were entitled to justice without paying for the same, and who, in the present day, would be allowed to sue *in formâ pauperis*. The bill contained a suggestion of the suitor's poverty, and that, by reason of his indigent circumstances, he was unable to sue at law,—or that he was one of the king's servants ordinarily attendant upon his person (*k*).

Petitions to the Council.

Under Richard II., the Council was entirely separated from the Parliament. Petitions were divided into three classes,—

1. *Bills of Grace.*—These were principally solicitations for offices, pardons, and the like; and which the king answered in person.

2. *Bills of Council;*—which could be answered by that assembly.

3. *Bills in Parliament;*—which could not be answered except by consent of Parliament.

Court of Requests resorted to by inferior suitors.

The lords of the Council were to meet between eight and nine o'clock; and the bills of the people, of *lesser* charge, were to be executed and dispatched before the keeper of the *privy seal*, and such of the Council as should be present for the time being. "From this delegation to the privy seal we trace," says Sir F. Palgrave, "the authority afterwards claimed by that officer in the

(*k*) Sir T. Smith's Commonw.; Seton's Early Rec. 17, 18.

Court of Requests." In the reign of Henry VIII., this court was composed of the lord privy seal and the master of the requests; who were, for the most part, doctors of the civil law, like the masters in chancery (*l*). Originally, such petitions as were exhibited to the king, and delivered to the masters of the requests, were to be perused by them; and they then directed the party to take his remedy, according to his case, either at the common law or in the Court of Chancery (*m*). It sat regularly, and dispatched much business, until 41 Elizabeth, when its authority was destroyed by a decision in the King's Bench, which declared that the Court of Requests, or the Whitehall (the Chambre Blanche in the palace of Westminster), had no power of judicature, and that the arrest of a defendant under a bond to the sheriff, conditioned for his appearance in the Court of Requests, was a false imprisonment.

Reasons for the earlier disuse of the Court of Requests before other similar jurisdictions.

Sir F. Palgrave considers that the reason why this court lost credit before its kindred jurisdictions, and became the object of such determined attacks by the judges of Westminster Hall, was the countenance and assistance which that court gave to examination by torture: the master of the requests being usually deputed to take the examination of criminals on the rack.* Whatever existence might have remained to it as a court after the above event, it was finally put an end to by the 16 Charles I. c. 10, together with its cognate jurisdictions, when the Privy Council was declared to be a usurpation, and contrary to the law of the land.

(*l*) Palg. Counc. 99. (*m*) Co. Inst. b. iv. 96.

* The circumstance also of the Archbishop of Canterbury having prevailed upon Charles I. to direct that one-half of the masters in Chancery should always be civil lawyers, and that no others should serve him as masters of requests, added not a little to the good feeling that existed among the common lawyers for abolishing the Court of Requests.—Clarend. Hist. ii. 305, ed. 1720.

CHAP. I.

Principles of equity contained in the decrees of the chancellors.

As the principles which govern the proceedings in our Court of Chancery, upon which we can rely with any decree of accuracy, are unfolded in the decrees of those judges who have successively contributed to rear the fabric of our equitable jurisdiction, it may not be unacceptable to the student, to lay before him a short account of the various Report-books containing those judgments and their different degrees of merit, from the reign of Charles I. to the present time; although it was not until after the Restoration, that there was any regular publication of cases reported in the court: Lord Bacon, it is true, states that he made more than two thousand orders and decrees in a year (*n*); he also mentions that after he was chancellor he prevailed with King James I. to appoint two reporters, each with a salary of £100 a year (*o*); but we have no reports of Chancery decisions until after his time. Before entering upon the subject of these Reports, as they are now understood, it may be necessary to premise that the history of the Court of Chancery is considered in reference to three grand epochs of its existence: first—its ecclesiastical period; which embraced that interval between its earliest origin until the reign of Henry VIII., and during which time it was, with few exceptions, under the superintendence of ecclesiastical chancellors in succession: secondly—its intermediate or more secular period; *i. e.* between the appointment of Sir T. More, the first of the race of lay chancellors, and the appointment of Lord Nottingham, in the time of Charles II.; and thirdly, from the reign of that monarch —when its modern era commences—until the present time.*

No regular Reports until after the Restoration.

(*n*) Bacon's Works, iv. 530. (*o*) Law Tracts, 12 (n).

* Our consideration, however, of these different epochs must be taken with some qualification. It may therefore be as well to state that the first of these divisions with respect to their *ecclesiastical* character form the rule, the *lay* the exception; since, during the

As the authority of the Court of Chancery was originally exercised in matters which could not be properly reached by the ordinary courts of law, and the chancellor's office was, among other purposes, established to mollify the extremity of the law, it cannot be supposed that, where no case in point could be found as a guide, the want of exact precedents would prove any impediment to the relief of a party, who happened to be aggrieved by any of those injurious acts which might fall under the denomination of accident, extremity, fraud,

period called the ecclesiastical, there were several laymen who flourished as chancellors; but these were generally appointed on account of their nobility of birth, or their already acquired legal celebrity. Of the former, we find Sir Robert de Bourchier, who was the first lay lord chancellor appointed by an English *king*; he held office from A.D. 1340 to 1341 only (although before him as *first* lay lord chancellor, we find one William Fitzgilbert, chancellor to Queen Matilda, who acted as such from A.D. 1142 to 1150); Richard le Scrope, from 28th October, 1378, to July, 1379; Sir Thomas Beaufort, afterwards Duke of Exeter, from 1410 to 1412; Richard Neville, Earl of Salisbury, from 1454 to 1455. Of the latter class of laymen, i. e., those who qualified on account of their previously high legal position, may be named Sir Robert Parnynge, who, from lord chief justice of England and lord treasurer, became lord chancellor from 29th October, 1341, to 1343; Sir John Knyvet, lord chief justice of England, also held the great seal from 5th July, 1372, to 11th January, 1377; Sir Thomas More, although he was so singularly gifted and had already gained a wide-spread celebrity for his talents and learning, had not attained to any distinguished position in the law when appointed to the great seal upon Wolsey's resignation. There were also a few clerical exceptions when the appointment of *lay* chancellors became to be established as a rule: for instance, there was Goodrich, Bishop of Ely, who held the great seal from 22nd December, 1551, to July 20th, 1553; Stephen Gardyner, Bishop of Winchester, from August 23rd, 1553, to 12th November, 1555; Nicholas Heath, Archbishop of York, from Hilary Term, 1556, to November 18th, 1558, and John Williams, Archbishop of York, from July 10th, 1621, to 25th October, 1625.

CHAP. I.

oppression, breaches of trust, and the like; but, in such cases, recourse would be had to first principles of equity and conscience, as deducible from the Roman jurisprudence, rather than the mere private opinion of the judge; and when once a sentence was pronounced it would doubtless form a precedent for subsequent cases falling within the same class. These were reported in the Year-Books, from a period anterior to the reign of Henry VI.; but, as they were taken down by common-law reporters, they were not at all times to be relied upon (*p*). The more accurately reported cases seem to have been those *precedents* which are contained in the registrar's books, from the time of Henry V., or some earlier period;* and to which the chancellors frequently appealed as the ground for their decision. As the clerical chancellors, however, during the first era referred to, were well skilled in the Roman civil law, a system of reports or precedents might not possibly have been considered so essential for their guidance, as they were for the lay chancellors during the same period. But, as the latter were not equally expert and learned in the doctrines of the civil law, and its application of the rules of equity and conscience, as were the former, a series of decisions was still deemed to be of the highest importance; in obtaining which the judges were aided by the master of the rolls, and the masters, who were generally ecclesiastics or doctors of the civil law, and, according to Lord Ellesmere (Sir Thomas Egerton) (*q*), assisted the court to show what was the equity of the civil law, and on this account were the more careful to

Year-books.

(*p*) Spence's Eq. Jur. 416—713.

* The earliest decree of which we have any account is that of 17 Rich. II. (Coke, 2 Inst. 553; 4 Inst. 83). The enrolment of decrees began in the reign of Henry VIII.

(*q*) Observ. 37.

collect and arrange the notes of the cases which they took in court, while sitting on the bench with the chancellor.

Lord Chief Justice Treby, when sitting in the Court of Chancery with Somers, L. K., Holt, C. J., and Powel, B., 12th December, 1693, in the case of Lord Bath *v.* The Earl of Montague (*r*), declared that the Court of Chancery was no doubt limited by precedents and practices of former times, and that it was dangerous to extend its authority further. "If, therefore," said the learned judge, "I err in my opinion in this case, I err with these precedents on my side."

L'Authoritie et Jurisd. des Courts.

Most of the cases in the Year-Books are collected by Richard Crompton, in his work entitled "L'Authoritie et Jurisdiction des Courts:" it was first published in the year 1594 or 1595, temp. Eliz., in the last year of the Lord K. Pickering. This collection was re-published in 1637.

Tothill.

Tothill's "Transactions and Proceedings of the High Court of Chancery," were published in the early part of 1596, and re-published in 1671. They appear to be nothing more than a digest of cases, such as is found at the end of a modern volume of Reports, arranged in alphabetical order, according to the subject-matter decided. In this compilation are mentioned some few of the judgments of Lord Ellesmere during the time of his being Lord Keeper.*

Lord Ellesmere.

Lord Ellesmere's "Observations concerning the Office of Chancellor." This is a small work which treats of

(*r*) 3 Ch. Cas. 95.

* This eminent judge was made lord chancellor and a peer by the title of Baron Ellesmere, upon the accession of James I., 19th July, 1603. He was afterwards raised to the rank of viscount by the title of Viscount Brackley, by which he is but little known.—Lord Campbell's Lives of the Chancellors, v. 2, 256.

CHAP. I.

the office and authority of the chancellor, and other functionaries of the court; it contains, also, an account of its jurisdiction and form of pleadings, wherein many cases and statutes of Parliament are cited. It was published in 1651.

Sir G. Cary.

Sir George Cary's Reports were published in 1650; but were first collected in 1601, by William Lambard, or Lambert (*s*), one of the masters. There are some others, also, of various degrees of merit, during the time of Lord K. Coventry. These were afterwards published in Nelson's Reports, and occupy a period between the reigns of Charles I. and William III., both inclusive.

Ch. Cas. temp. Car. I., Car. II., and Jac. II., etc.

The volumes called "Reports of Cases taken and adjudged in the Court of Chancery, in the reigns of Charles I., Charles II., James II., and William III., and Queen Anne," contain the earliest adjudged cases in equity. There is also another set of Reports, entitled "Cases argued and decided in the High Court of Chancery." These extend over the *de facto* reign of Charles II., commencing with the Restoration, and embrace some few cases also in the reign of James II.; and, with the exception of the case of the Duke of Norfolk (which involved the doctrine of perpetuities), and that of Bath *v.* Montague, contained in the third volume of the last-mentioned Reports, they are not generally considered of much weight or authority, on account of their looseness and inaccuracy.

Lord Nottingham, C.

There are but few reports of Lord Chancellor Nottingham's* decisions, who presided over the Court of Chancery during the latter part of the reign of Charles II.,

(*s*) Ed. 1820.

* Sir Heneage Finch. He became Lord Keeper as Lord Finch of Daventry, 9th November, 1673; was made Lord Chancellor as Earl of Nottingham, 19th December, 1675 (Dugd. 118), and died 18th December, 1682.

although he is considered as having raised the reputation of the court to a far greater pitch of eminence than it enjoyed at any previous era of its existence. This distinguished judge having, for the few years that he held the seals, applied his vast intellect and profound learning to the duties of his high office, succeeded in establishing the jurisdiction of the court upon a basis so sound and rational, as to give a new impulse to the cultivation and study of the equitable jurisprudence: and hence we date a fresh era in the history of the Court of Chancery; from which time the decisions of succeeding judges are to be carefully studied, as containing a development of those principles upon which the court is to this day governed.

In following up the series of Reports, throughout the last epoch of the Court of Chancery, commencing from the reign of Charles II., recourse has been had to Professor Kent, in his "Commentaries on the American Law" (*t*). This elegant writer has given us not only a description of the Reports, and the several chancellors that presided in the court, whose decisions they contain in chronological order, but also a faithful account of the reporters themselves, and their respective merits. He begins with VERNON; who was the best of the old reporters in Chancery. His Reports were published from his manuscripts after his death, by order of Lord Chancellor King, and were found to be quite imperfect and inaccurate.* In 1806, Mr. Raithby favoured the

Vernon.

(*t*) Vol. i. 491, 3rd ed.

* In a case which appears reported in the "Times" newspaper for May 28th or 29th, 1799—*i. e.* Hardley *v.* Clarke and others—Lord Kenyon laments the inaccuracy of Vernon's Reports, although he concluded by saying that Vernon "was the ablest man in his profession." It is difficult to imagine how an individual can, from motives of personal pique, work a certain injury to his own future

CHAP. I.

profession with a new and excellent edition of Vernon, enriched by learned notes and accurate extracts from the registrar's books; so that the volumes assumed a new dress and more unquestionable authenticity. They include part of the judicial administration of Lord Nottingham, and the whole of the time of Lord Somers; but they give us nothing equal to the reputation of those great men. They bring the series of equity decisions down to and include those determined in Lord Chancellor Cowper's judicial career.

Precedents in Chancery.

PRECEDENTS IN CHANCERY are a collection of cases, commencing with the reign of William III., and ending with the year 1722. To these may be added the first volume of "Equity Cases, Abridged;" as they are generally supposed to be reported by the same author (*u*). The cases contained in these volumes are very brief, in comparison with the lengthy details of modern Reports; but they are of respectable authority.

Eq. Cas. Abr.

Peere Williams.

We come now to PEERE WILLIAMS's Reports, which, beginning with the reign of Queen Anne, carry on the series of decisions to the year 1735, and contain the judgments of eminent men who occupied the woolsack during that period. These Reports are esteemed as the most perspicuous, useful, and interesting repositories of equity law to be found in the language; but Mr. Cox, in his notes to the fourth edition of those Reports, has,

reputation, unless it be the anticipated enjoyment of a posthumous bit of spleen against the lasting fame of a living adversary; but it appears that Lord Harcourt had given some mortal offence to Vernon, who practised as a counsellor regularly before him: Vernon, therefore, spitefully suppressed his best decisions, and gives doubtful ones. "I suspect," says Lord Campbell, "that the reporter may have been a Whig, and copied the Tory blacksmith, who in shoeing the horse of a Whig always lamed him."—Lives of the Lord Chancellors, vol. iv. 458, n. ‡.

(*u*) 3 Ves. 285.

by his learning and industry, stamped them with an additional value. The third volume, however, is not considered to be of equal authority as the two preceding ones, which were published in his lifetime.

Moseley.

MOSELEY'S REPORTS of cases during the time of Lord Chancellor King have received contradictory treatment from different high legal authorities. Lord Mansfield, a common law judge, declared that it was a book not to be quoted (*x*); and Thompson, B., that the authority of Moseley was very small (*y*); but Lord Eldon—whose long acquaintance with the jurisdiction and principles of the Court of Chancery might be presumed to have given him a better opportunity of judging the merits of the work—says he himself thought differently from Lord Mansfield on that subject, having always considered Moseley's Reports as a book possessing a very considerable degree of accuracy (*z*).* Lord King was a distinguished scholar; and it may be considered as no little compliment to his erudition, that it was he to whom Mr. Locke, his maternal uncle, bequeathed his papers and library.

Cases tem. Talbot.

Although the career of Lord Talbot, as chancellor, was but of short duration, it was nevertheless sufficient to afford the nation full evidence of his high integrity as a man, and his qualifications as a judge. His loss was universally regretted. The cases which contain his decisions are reported under the title of "CASES TEMPORE TALBOT," and have a reputation for being carefully and accurately reported.†

(*x*) 5 Burr. 2629.

(*y*) 3 Anstr. 861.

(*z*) Mills *v.* Farmer, 1 Meriv. 92.

* See note to "Lives of the Chancellors," vol. iv. p. 614.

† Although some of Lord Talbot's decisions are to be found in Peere Williams's Reports, and in an octavo volume intituled as in

CHAP. I.

Lord Hardwicke, who succeeded Lord Talbot in the year 1737, was one of the most eminent judges that ever presided in the Court of Chancery. During the twenty years he held the seals, he bent the energies of his well-stored mind to establish our equitable system of jurisprudence upon a wise and rational foundation. No lawyer in the judicial annals of our country ever enjoyed more unqualified homage, for the extent of his learning and the solidity of his understanding, than this great judge. The reports of his decisions are contained in VESEY *senior*, ATKYNS, and partly in AMBLER and DICKENS; and, although they are not distinguished for much talent as reporters, the genius and learning of Lord Hardwicke is seen and appreciated throughout all their defects and inaccuracies. Scarcely any judge, however eminent, has ventured to question the authority of his decisions.

Ves. sen., Atkyns, Ambler, Dickens.

The following eulogium was paid by the venerable Lord Eldon to the merits of Lord Hardwicke in the House of Lords on Friday, the 29th of April, 1836:—"No man felt more highly—no man admitted more highly the character of Lord Hardwicke as a judge in equity than he did. Few men had had a greater opportunity than had been afforded to him of arriving at a just estimation of the great abilities of Lord Chancellor Hardwicke; for early in his professional life the late Lord Hardwicke had placed in his hands the manuscript notes of his father the lord chancellor, and they fully proved the zeal, ability, and diligence which he applied to and with which he disposed of the business of his court. From these manuscripts it was evident that he took the most copious notes and made the most elaborate minutes in the course of the judicial proceedings that

the text, his chief reporter was a Mr. Forester, who practised in his court.—Ibid. p. 666.

came before him. From them it was manifest that his decisions were not delivered at the moment; they were not founded on a mere recollection of what had passed in court—no, his judgments were written in his own hand, and were read by him in court."

To be the successor of Lord Hardwicke required a judge of rare and vigorous intellect, and whose knowledge of the law was profound and extensive: such a one was Lord Northington, whose decisions were published by his grandson HENLEY. These Reports are characterized for their accuracy and fidelity, and were principally drawn from the manuscripts of Lord Northington himself, which consisted of six volumes of note books (*a*): they embrace a period of nine years, *i.e.* from 1757 to 1766, which was the time his lordship occupied the woolsack.

Eden.

Although there were three individuals who held the great seal between the resignation of it by Lord Northington and the appointment of Lord Thurlow (namely, Lord Camden, the Honourable Charles Yorke and Lord Bathurst), yet there appears to have been no change or addition to the names of the reporters in the interval between Lords Hardwicke and Thurlow. Perhaps no one who ever occupied the woolsack was better qualified for the important duties of his high position than Lord Camden (Charles Pratt), who followed immediately upon the retirement of Lord Northington. During the short time that he held the great seal he added a lustre to the highest office of his profession as an accomplished jurist and a sound general lawyer—he having previously qualified himself by diligently studying the principles and practice of those two grand branches of our English jurisprudence, common law and equity. To these he also brought a profound knowledge of the Roman civil

(*a*) *Vide* Pref. to Eden's Reports.

CHAP. I.

law. But, notwithstanding the just admiration which the decisions of this eminent judge elicited, both from the legal profession and the public at large, for their learning, correctness and great perspicacity, it is to be regretted that they are but very feebly and inadequately given to us by his reporters AMBLER and DICKENS.

The accomplished scholar and lawyer Charles Yorke, the second* son of Lord Hardwicke, died within a very few days after his acceptance of the great seal, and was succeeded by Bathurst, first as one of the commission and afterwards (January 23rd, 1771) as Lord Chancellor.

To Lord Bathurst succeeded Thurlow as chancellor, whose judicial reputation is well known. The decisions of this eminent judge are, as to the greater part, preserved in BROWN'S REPORTS. The author of these volumes merits the thanks of the profession for the care and general accuracy which he has observed in their compilation. Lord Kenyon was Master of the Rolls under Lord Thurlow; and his decisions, as well as those of the lord chancellor during the same period, appear in COX'S CASES IN CHANCERY. These cases, so far as they reach, are intended as a supplement to Brown's Reports, and those of Vesey, junior. Cox has the reputation of being a reporter of brevity, perspicuity and undoubted fidelity. That which, says Lord Eldon, makes Mr. Cox's work of so much value in the library of a lawyer is his habit of examining the registrar's book for the purpose of greater accuracy (*b*). Lord Loughborough (Alexander Wedderburn), following Lord Thurlow, received the great seal January 23rd, 1793. His decisions are contained in the second, third, fourth

Brown.

Cox.

* He was to have been raised to the peerage by the title of Lord Morden.

(*b*) Aldrich *v.* Cooper, 8 Ves. 382.

and fifth volumes of Vesey, junior, comprising a period of eight years and a quarter. CHAP. I.

The Reports of the younger VESEY (among the most voluminous which at present appear upon the shelves of the Chancery barrister) extend over a considerable space of time: they embrace not only the judgments of Sir Richard Pepper Arden, Master of the Rolls,—the entire number of Lord Loughborough and Lord Erskine—but they also continue the decisions of the court far into Lord Eldon's time. These Reports, contained in nineteen octavo volumes, are remarkable for their copiousness and fidelity; although the wary and doubting character of this most distinguished and upright judge (Lord Eldon) has formed the theme of frequent pleasantry and humorous jest; insomuch that the Court of Chancery, while he held the seals, appeared to many a despairing suitor no other than John Bunyan's renowned Doubting Castle itself. If, however, we take into consideration that the delays then so frequently lamented, arose not from any principle of indolence in the Chancellor, but a rigid and conscientious anxiety to arrive at just conclusions upon every case which came before him, we shall probably find that the general benefit bequeathed to the public by such protracted ponderings far outweighs the inconvenience which private individuals were so frequently called upon to endure; for, whenever a case arose of sufficient novelty or importance to demand the attention of his lordship's comprehensive mind, and to call forth his deliberate and well-weighed judgment, it was scarcely anticipated that any chancellor would afterwards venture to call into question, much less to overrule, that judgment, supported, as it would be, by the most profound learning and deep and careful investigation. Thus both the profession and the public felt they had a sufficient guarantee that a judicial sentence of Lord Eldon, when Vesey, jun.

CHAP. I.

once pronounced, would stand the test of legal scrutiny, and serve as an authority for future judges.

Living reporters.

It would seem a task of rather too delicate a character to venture an opinion as to the merits of those gentlemen who have carried on the series of decisions in the lord chancellor's court, from the last volume of Vesey, jun., to the present time, except by merely stating that the learning, copiousness and accuracy of their Reports have hitherto gained for their authors the well-merited confidence of the legal profession, whether contained in the volumes of Beames, Cooper, Merivale, Swanston or their successors.* To these must be added the Reports of the

* The whole number of reporters, including Vesey, jun., and those who have succeeded him in the High Court of Chancery, together with the period over which their Reports extend, is as follows:—

Vesey, jun.	from 29 to 52 Geo. III.
Vesey and Beames ..	„ 52 to 54 Geo. III.
Cooper (G.)	„ 55 Geo. III.
Merivale	„ 56 & 57 Geo. III.
Swanston	„ 58 & 59 Geo. III.
Jacob and Walker ..	„ 60 Geo. III. to 1 & 2 Geo. IV.
Jacob	„ 2 & 3 Geo. IV.
Turner and Russell ..	„ 3 to 5 Geo. IV.
Russell	„ 6 to 9 Geo. IV.
Russell and Mylne ..	„ 10 Geo. IV. to 1 & 2 Will. IV.
Mylne and Keen	„ 3 to 6 Will. IV.
Mylne and Craig	„ 6 Will. IV. to 4 & 5 Vict.
Craig and Phillips ..	„ 4 & 5 Vict.

Lord Chancellor's Court and Court of Appeal in Chancery.

Phillips	from 5 to 11 Vict.
Hall and Twells	„ 12 Vict. 1849, to 13 & 14 Vict. 1850.
Macnaghten and Gordon	„ 12 Vict. 1849, to 14 & 15 Vict. 1851.
De Gex, Mac. & Gord. ..	„ 14 & 15 Vict. 1851.
De Gex and Jones ..	„ 1856 to 1859.
De Gex, Fisher and Jones	„ M. T. 1859, to 1862.
De Gex, Jones and Smith	„ 1862 to 1865.
Law Reports. Chancery Appeals	„ 1865-6 to present time.

Court of Chancery in Ireland, possessing equal authority, and no less merit, than those in our English courts of equity.

Rolls Court.

Tamlyn .. .. from 9 Geo. IV. 1829, to 1 Will. IV. 1830.
Keen .. .. „ 6 Will. IV. 1836, to 1 Vict. 1839.
Beavan .. .. „ 1 Vict. to 1866.
Law Reports. Equity .. „ 1865—6 to present time.

Vice-Chancellor of England's Court.

Maddock .. .. .. from 55 Geo. III. 1815, to 1 & 2 Geo. IV. 1822.
Simons and Stuart .. „ 2 Geo. IV. 1822, to 7 Geo. IV. 1826.
Simons .. .. „ 7 Geo. IV. 1826, to 13 & 14 Vict. 1850.

Vice-Chancellor Cranworth.

Simons, N. S. .. .. .. from 13 & 14 Vict. 1850 to 15 & 16 Vict. 1851.

Vice-Chancellor Kindersley.

Simons, vol. xvii. .. .. from 1852, 15 & 16 Vict.
Simons, N. S., vol. ii. .. „ 1852, 15 & 16 Vict.
Drewry .. .. „ 15 & 16 Vict. 1852, to 1859.
Drewry and Smale .. „ 1859 to 1865.
Law Reports. Equity, vol. i. „ 1865 to 1866.

Vice-Chancellor Sir James Wigram.

Hare .. .. from 5 Vict. 1841, to 12 & 13 Vict. 1850.

Vice-Chancellor Sir James Lewis Knight Bruce's Court.

Young and Collyer .. from 5 Vict. M. T. 1841, to 6 & 7 Vict. H. T. 1844.
Collyer .. .. „ 7 Vict. H. T. 1844, to 9 & 10 Vict. M. T. 1846.
De Gex and Smale .. „ 10 Vict. 1846, to 15 Vict. 1851.
Hare, vol. viii. .. .. „ 13 & 14 Vict. 1850.

Vice-Chancellor Sir James Parker.

De Gex and Smale, vol. v. from 15 Vict. M. T. 1852, to Trinity Vacation, 16 Vict. 1853.

Vice-Chancellor Turner.

Hare, vols. ix. and x. .. from 14 & 15 Vict. 1851, to 15 & 16 Vict. 1852.

CHAP. I.

Proper method to be observed in studying the Reports.

It may, perhaps, be well to remind the student that, in reading the Reports, he ought to pursue a course exactly the reverse in chronological order from that adopted in any other kind of reading; for, commencing with those of recent date, and getting the present law well fastened upon his memory, he should read the decisions upwards, until he has traced the principles and practice involved in analogous cases to their very source. By these means, he will avoid getting his mind imbued with old law and

---

Vice-Chancellor Wood.

Hare, App. to vol. ix.	.. from	16 Vict. 1853.
Hare, vol. x., xi.	„	15 & 16 Vict. 1852, to 16 & 17 Vict. 1853.
Kay	„	16 Vict. 1853, to 17 Vict. 1854.
Kay and Johnson	„	17 & 18 Vict. to 21 & 22 Vict.
Johnson	„	1858 to 1860.
Johnson and Hemming ..	„	1859 to 1862.
Hemming and Miller ..	„	1862 to 1865.
Law Reports. Equity, vols. i. to v.	„	1865 to 1868.

Vice-Chancellor Stuart.

Smale and Giffard ..	from	16 Vict. M. T. 1852.
Giffard	„	1858 to 1865.
Law Reports. Equity ..	„	1865 to present time.

Vice-Chancellor Giffard.

Law Reports. Equity, vol. v. from 1868.

Vice-Chancellor Malins.

Law Reports. Equity .. from 1866 to present time.

Vice-Chancellor James.

Law Reports. Equity, vols. vii. to x. .. .. from 1869 to present time.

Vice-Chancellor Bacon.

Law Reports. Equity, vol. x. from 1870 to present time.

To these must be added C. P. Cooper's Rep. temp. Brougham, 1833-4, and C. P. Cooper's "Points of Practice," 1837-8.

ancient cases, which have perhaps become obsolete, or for a considerable time have been overruled.

Prof. Kent's character of the said Reports.

The character and utility of our Law Reports in general, and the effect which their contents have upon the system of jurisprudence in England, cannot be given in a more glowing and masterly style than in the words of the distinguished individual whose Commentaries above referred to have gained him a name, not only among our transatlantic brethren, but in our own country also, as a lawyer of no ordinary merit. "The old cases," says he, "prior to the year 1688, need only be occasionally consulted, and the leading decisions in them examined; some of them, however, are to be deeply explored and studied; and particularly those cases and decisions which have spread their influence far and wide, and established principles which lie at the foundations of English jurisprudence. Such cases have stood the scrutiny of contemporary judges, and have been illustrated by succeeding artists, and are destined to guide and control the most distant posterity. The reports of cases since the middle of the last century ought, in most instances, to be read in course, and they will conduct the student over an immense field of forensic discussion: they contain that great body of the commercial law, and the law of contracts and of trusts, which govern at this day: they are worthy of being studied, even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law Reports are dramatic in their plan and structure; they abound in pathetic incident and displays of deep feeling: they are faithful records of those 'little competitions, factions, and debates of mankind,' that fill up the principal drama of human life, and which are engendered by the love of power, the appetite of wealth, the allurements of pleasure, the delusions of self-interest,

CHAP. I.

the melancholy perversion of talent, and the machinations of fraud: they give us the skilful debates at the bar, and the elaborate opinions on the bench, delivered with the authority of oracular wisdom: they become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law. We should have known but very little of the great mind and varied accomplishments of Lord Mansfield if we had not been possessed of the faithful reports of his decisions: it is there that his title to the character of 'founder of the commercial law of England' is verified. A like value may be attributed to the reports of the decisions of Holt, Hardwicke, Willes, Wilmot, De Grey, Camden, Thurlow, Kenyon, Sir William Scott, and many other illustrious names, which will be as immortal as the English law. Nor is it to be overlooked, as a matter of minor importance, that the judicial tribunals have been almost uniformly distinguished for their immaculate purity. Every person well acquainted with the contents of the English Reports must have been struck with the unbending integrity and lofty morals with which the courts were inspired. I do not know where we could resort, among all the volumes of human composition, to find more constant, more tranquil, and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the iron times of the Tudors, and fall on judicial history, down from the first page in Drew to the last page of the last reporter, we should find the higher courts of civil judicature generally, and with rare exceptions, presenting the image of the sanctity of a temple, where truth and justice seem to be enthroned, and to be personified in their decrees."

CHAPTER II.

GENERAL OBSERVATIONS ON EQUITY.

Equity: definition of.

Equity is defined by St. Germaine to be "a right wisenes that considereth all the perticuler circumstances of the deede, the which also is tempered with the swetenes of mercy; and such an equitie must always be observed in every law of man, and in every general rule thereof, to temper and mitigate the law" (*a*). But, whatever may have been the notions of former ages respecting the powers of an equitable judge, in deciding according to the dictates of his own conscience, as to what he conceived to be reasonable and just, it is certain that the rules of equity, as observed in the administration of justice in the Court of Chancery in more modern times, are not left to the arbitrary opinions of its presiding judges, but are governed by a system of tried, fixed, and well-grounded principles.

What is equity as administered in the Courts of Chancery.

Equity, as administered in our courts of chancery, is no more than such a measure of justice as would be afforded in our courts of common law, were it not from their imperfect manner of giving redress.* The constitution and machinery of those courts having been formed in a rude unpolished era—however well adapted to meet

(*a*) Doc. and Stu. Dia. 1, ch. 16, ed. 1580.

* Although law and equity are distinct, both in their courts, their judges, and the rules of justice, "yet they both aim at one and the same end, which is *to do right;* as justice and mercy differ in their effects and operations, yet both join in the manifestation of God's glory."—Per Lord Ellesmere, Earl of Oxford's case, 13 Jac. 1.

CHAP. II.

the exigencies of that period—were by no means adequate to afford relief in all the varied and multiplied cases which a more refined and artificial age has introduced; for example, in the specific performance of contracts, a court of law, although it acknowledges the mutual *right* of the contracting parties to a performance in specie, is nevertheless inadequate to afford a complete remedy. "I can easily understand," said his Honour the Vice-Chancellor of England (*b*), "that this court might have assumed a larger jurisdiction than the courts of common law, as it has often taken the lead, and suggested to the legislature what ought to be done. As, for instance, in cases of set-off, and of landlords taking advantage of breaches of covenants for payment of rent, this court did interfere long before there was any statutory interference."

Æquitas est convenientia rerum, quæ cuncta coæquiparat et quæ in paribus rationibus paria jura et judicia desiderat; et jus respicit æquitatem. Æquitas enim est perfecta quædam ratio quæ jus scriptum interpretatur et emendat (*c*).

General description of a court of equity.

"The most general, if not the most precise, description of a court of equity is, that it has jurisdiction in cases of rights recognized and protected by the municipal jurisdiction, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction: it must be adequate; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity: and it must be complete; that is, it must attain the full end and justice of the case: it must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the

(*b*) Jones *v.* Roberts, 8 Sim. 403.
(*c*) Brac. lib. 4, fo. 186.

present time, and in the future; otherwise equity will interfere, and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity is therefore sometimes concurrent with the jurisdiction of a court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it" (*d*).

Origin of the common law courts.

Our courts of common law, as they appear to have grown out of universal consent and immemorial usage, are based upon such principles of reason as would afford a remedy in every instance of injury or fraud; but, as before observed, they lack those means which a court of equity possesses, and which is therefore resorted to for the purpose, of carrying out the intention of the common law; and thus we find, that whenever relief may be had at law, the suitor is driven to seek it in an ordinary court of judicature, unless where it happens that the courts of law and equity have a concurrent jurisdiction. "There is," said Lord Tenterden (*e*), "a great objection to courts of law taking upon themselves to act as a court of equity; because they have not the means of doing that full and ample justice which the particular case may require."

Definition of equity.

Some writers have defined equity to be the supplement of a defective law, deciding according to the will or supposed intention of the lawgiver, which he was not able, or not willing, to express.

Aristotle.

Aristotle calls it a species of justice distinct from what is written; which may happen either contrary to the design and inclination of the lawgiver, or with his consent: in the former instance, where a number of particular facts may escape his knowledge; in the other, when he perhaps may be conusant thereof, but, on account of their variety, he is

(*d*) 1 Story's Eq. Jur.; 1 Fonbl. c. 1, s. 1—3, ch. 1, s. 33.

(*e*) Townson *v.* Green, 2 Car. & Pa. 111.

CHAP. II.

not willing to enumerate them (*f*): so, in the civil law, "in omnibus quidem, maxime tamen in jure, æquitas spectanda est" (*g*). In what that equity consisted, and the action by which it was sought to be obtained, it was left for the prætor to decide, where the law itself to which it had reference existed; for, in regard to the Lex Aquilia, it is said, "eas actiones quæ legibus proditæ sunt, si lex justa et necessaria sit, supplet prætor in eo quod legi deest" (*h*).

K. James.

In a speech delivered by King James in the Star Chamber, upon the subject of the law and courts of justice, on the 20th of June, 1616—part of which is extracted by Mr. Saunders, Ord. Ch. p. 10—we have the following:—"Then there is a Chancerie Court: that is a court of equitie; and hath power to deale likewise in civill causes. It is called a dispenser of the king's conscience; following always the intention of law and justice: not altering the law,—not making that blacke which other courts make white, nor *è converso;* but in this it exceeds other courts, mixing mercie with justice, when other courts proceed only according to the strict rules of law; and where the rigour of the law in many cases will undoe a subject, there the Chancerie tempers the law with equitie, and so mixeth mercie with justice, as it preserves men from destruction. And thus, as I before told you, is the king's throne established by mercie and justice.* The Chancerie is independent of any other

(*f*) Arist., 1 Rhet. 14.

(*g*) D. 50, 17, 19. (*h*) D. 19, 5, 11.

* This appears to have been a favourite idea of King James, and which he took no little pains, and lost no opportunity, to impress upon his subjects; for, in the bill of pardon to the Countess of Somerset (formerly Countess of Essex), as accessary before the fact to the imprisonment and death of Sir Thomas Overbury, he reminds the public that he is the source from which the fountains as well of

court, and is onely under the king. There it is written, *teste me ipso;* from that court there is no appeale.* And, as I am bound in my conscience to maintain every court's jurisdiction, so especially this, and not suffer it to sustaine wrong; yet so to maintaine it as to keep it within its owne limits, and free from corruption."

A court of equity, when used to enforce a judgment at law.

The aid of our courts of equity may also be obtained to enforce the judgment of a court of ordinary jurisdiction: and thus, when a plaintiff at law has proceeded to execution upon an *elegit* or *fieri facias*, which several writs are defeated by a prior title, either obtained by fraud, or which does not extend to the whole interest of the debtor in the property upon which the judgment is intended to be executed, he may file a bill to obtain the execution of the *elegit* or *fieri facias;* but in either of these cases it is incumbent upon the plaintiff to prove that he has proceeded at law as far as he is able to perfect his title, otherwise a demurrer will be allowed. Therefore it is necessary for the plaintiff to show that he has sued out his writ, the execution of which is avoided; and, notwithstanding the opinion of many that the plaintiff has no need to procure a return of the writ (*i*), yet it was otherwise determined by Lord Nottingham (*k*), who held that a return was necessary. In the case of Neate

mercy as justice are wont to flow:—"Cum tam justitia quam misericordia fontes a solio regis promanare consueverint," etc.—Narrative History of King James for the first Fourteen Years.

* The jurisdiction of the House of Lords was of subsequent date. Prior to that, the appeal lay only to the king himself (*vide ante*). It is probable that the appeal from the chancellor to the Upper House first arose in the early part of the reign of Charles I.—Sir Matt. Hale's Jurisdic. of the House of Lords, ch. 32.

(*i*) King *v.* Marissal, 3 Atk. 192; Mitf. Pl.

(*k*) *Cited arguo.* Balch *v.* Westall, 1 P. Wms. 445. *Vide* Adams, 129-30.

CHAP. II.

v. Duke of Marlborough (*l*), it was decided that a judgment creditor, who desires to enforce his security against his debtor's equitable interest in freehold estates by a bill in equity, must previously sue out an *elegit* against such estate; and further, that if his bill do not allege that he has done so, the defendant may demur. But equity will not control the ordinary courts of jurisdiction, in direct opposition to a plain and well-established rule of law, unless there be some particular circumstances attending the transaction which the suitor could not avail himself of at law, but which in conscience ought to be respected: for then, agreeably to its own principles, it proceeds upon the ground, that the rules of law are not applicable to, or framed to meet, the exigencies of such a case. "The Court of Chancery," said one of the judges, in the case of Bath *v.* Montague, 3 Ch. Cas. 67, "may do great things; but it cannot alter things or make them operate contrary to their essential natures and properties." Thus it is fully settled, that a lessee is liable on his covenant to pay rent, although the premises may have been destroyed by fire, or any other accident (*m*): from such a covenant he has no escape, either at law or in equity; but if the lessor covenant to rebuild the premises demised, in the event of their being burnt down, a court of law, not being able in an action for rent to take notice of this covenant, it might be within the province of a court of equity to restrain the lessor from proceeding in his action,—it being against conscience to insist on the benefit of a covenant which was induced by another covenant (*i.e.* the rebuilding in case of fire), which the lessor refuses or neglects to perform (*n*). But a tenant

Cases in which the court will not interfere to control the ordinary courts.

(*l*) Cuddon *v.* Herbert, 7 Sim. 485, 3 My. & Cra.

(*m*) Compton *v.* Allan, 6 T. R. 650.

(*n*) 1 Fonbl. Eq. 378, 5th ed. See the relief now afforded by a

has no equity to compel his landlord to expend money received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain him from suing for the rent until the premises are rebuilt (*o*).

Several degrees of relationship between the equity and common law jurisdiction.

The jurisdiction of the Court of Chancery is sometimes concurrent with the jurisdiction of the courts of common law, sometimes exclusive or independent of it, and sometimes auxiliary to it (*p*).

Concurrent jurisdiction.

The courts of law and equity have a concurrent jurisdiction over several matters which, from the greater convenience of furnishing a more complete remedy, have by degrees fallen almost entirely within the province of the equity department; and it appears to be a well-established doctrine of modern times, that civil fraud is cognizable by the Court of Chancery to reinstate the party defrauded, although also punishable at the common law or by statute (*q*); for notwithstanding divers of these cases are remediable at law, yet courts of law not having (until recently by the 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83) power to examine the defendant upon oath, many of those cases would utterly fail of redress for want of obtaining proof from the only party capable of giving it.

Fraud.

Thus over cases of *Fraud* a concurrent jurisdiction is maintained by the courts of equity and of common law, as where an illiterate person has been defrauded of his property by means of a deed having been falsely read

court of equity to lessees, in respect of their breaches of covenant in certain cases (22 & 23 Vict. c. 35, s. 4).

(*o*) Leeds *v.* Cheetham, 1 Sim. 146; Loft *v.* Dennis, 1 El. & El. 474, which was the case of an equitable plea at Com. Law under the new practice.

(*p*) 1 Stor. Eq. Juris. Introd.; Fonbl. Tr. Eq. b. i., c. 1, s. 3.

(*q*) Bright *v.* Eynon, 1 Burr. 390; Colt *v.* Wollaston, 2 P. Wms. 156.

CHAP. II.

Account.

over to him by the grantee or by a stranger. In such a case the deed may be avoided either at law or in equity (*r*). Also in matters of *Account*, the remedy was by action of account before auditors, which was introduced about the reign of Henry III. (*s*). Originally bailiffs or receivers only, and also guardians in socage, could be charged in account; but this rule was for the benefit of trade and commerce, and extended to cases between one merchant and another (*t*). However, in process of time, by reason of the peculiar adaptation of the Court of Chancery for taking long and complicated accounts in the proper office (formerly the master's office), and of its power of examining upon oath, and thus of drawing out the proper proofs from the party's own conscience, which, until the above-mentioned Act, a court of law was incapable of doing (*u*), the action of account gradually fell into disuse, and the Court of Chancery became and is now almost invariably the only tribunal applied to for the purpose; notwithstanding the modern doctrine laid down by L. C. B. Alexander, in Frutas *v.* Das Santos (*x*), namely, that in order to induce a court of equity to interfere in ordinary cases of account, they must be such as cannot possibly be justly and fairly taken in a court of law. Prior also to the Acts of Parliament "allowing a court of law to adjudicate upon an adverse independent claim, for the sake of giving the claimant the benefit of it by way of set-off," the Court of Chancery was the only tribunal for the adjustment of mutual demands between parties, where at law those

(*r*) 1 Fonbl. Tr. on Eq. b. i., c. 1, s. 3, note (*f*); Thorough-good's case, 2 Co. Rep. 9 a, p. 444.

(*s*) Bac. Abr. tit. "Accompt."

(*t*) 1 Inst. 372 a; 11 Co. Rep. 89; Cromp. on Courts, p. 49.

(*u*) 1 Stor. Eq. Jur. ch. viii., s. 462, 6th ed.

(*x*) 1 Y. & Jer. 576.

mutual debts and credits would be the subject of cross-actions, and not of account. The above Acts however give a court of law, in matters of *set-off*, a concurrent jurisdiction with the courts of equity.

Dower.

In the case of *Dower*, a concurrent jurisdiction existed also between the courts of law and equity, and the action by writ of right of dower and dower *unde nihil habet*, as hereafter mentioned (*y*), were two of the real actions allowed to exist after the passing of the 3 & 4 Will. IV. c. 27, s. 36, abolishing real actions generally. The earliest bill in Chancery on record appears to have been in the time of Henry VI., when the ground of the widow's application was her helplessness and poverty (*z*). So long as this was the only reason for applying to the Court of Chancery in case of dower, that court was probably but little resorted to; but when afterwards the full efficiency of the proceedings in this court, in affording a more perfect and satisfactory remedy, became better known and appreciated, namely, in ascertaining upon what estates the dower attached, their relative value, etc., without reference to the widow's poverty, the jurisdiction of this court became gradually and by slow degrees established. This jurisdiction was not therefore recognized in its fullest measure until comparatively modern times, owing to the cautious manner in which the power was conceded, and the doubts that formerly existed as to the extent of the jurisdiction (*a*).

Tithes.

Among other subjects upon which this concurrent jurisdiction was exercised, were reckoned *Tithes*. The circumstance of the clergy, in former times, resorting to

(*y*) *Infra*, p. 76 (n). (*z*) Spence, Eq. Jur. 653.

(*a*) Choice Cas. in Ch. p. 149; Wallis *v.* Everard, 3 Ch. Rep. 87; Curtis *v.* Curtis, 2 Bro. C. Rep. 634; 1 Fonbl. Tr. Eq. b. i., c. 1, s. 3.

CHAP. II.

the Court of Chancery for the payment of tithes and other ecclesiastical dues, on account of the defective power of the ecclesiastical courts to afford a remedy, appears to be but natural; the principal officers of that court being civilians and better conversant with the affairs of the Church than the common-law officers. And notwithstanding it had formerly been a disputed fact whether a custom or *modus decimandi* could be the subject of a suit in the Court of Chancery, yet it afterwards became fully settled that this latter tribunal had an inherent power of establishing moduses between parishioners, against the parson, patron, or ordinary (*b*). This jurisdiction of the court continued to be generally exercised from the reign of Elizabeth (the time when it became completely acknowledged), until the recent Tithe Commutation Act, 2 & 3 Will. IV. c. 100, which has the effect of almost depriving the court of this branch of its jurisdiction.

Partition.

In the case of *Partition*, there was originally but one means of settling the rights between coparceners and joint owners of estates, namely, the writ of partition, which was directed to the sheriff, ordering him by the assistance of a jury to ascertain the several shares, and then to assign to each owner his share accordingly. The concurrent jurisdiction of the Court of Chancery began to be recognized about the time of Elizabeth; and the greater facilities which that court afforded for ascertaining and adjusting the rights of parties in giving a more complete and satisfactory remedy by means of its commissioners for making partition, and by its power of compelling the parties to convey to each other their respective portions in severalty, so far established it as a concurrent jurisdiction with courts of law, that an application to the latter tribunal became of very rare occur-

(*b*) Toth. p. 282; Mitf. Pl.

rence, insomuch that in subsequent times its jurisdiction was rendered almost obsolete, when the writ of partition was finally abolished by the before-mentioned statute, 3 & 4 Will. IV. c. 27, s. 36, among the rest of the real actions which were thereby put an end to. The remedy at law being thus taken away, the jurisdiction of the Chancery Court is no longer concurrent with, but independent of, courts of law.

Although a court of equity may seem to entertain an almost exclusive jurisdiction in matters of *accident;* yet there are some cases in which a remedy may also be had at law, namely, the loss of deeds, mistakes in accounts or receipts, wrong payments, deaths which render it impossible to perform a condition literally, and certain others (*c*).

Trusts.

There are also certain species of *Trusts*, which fall within the jurisdiction of a court of common law, although generally speaking trusts are perfectly cognizable in equity, as deposits and all kinds of bailments, etc., for which the former tribunal will furnish a remedy (*d*).

Independent jurisdiction.

The instances wherein equity exercises a jurisdiction independently of the courts of law, are matters of trust, and now, since the 3 & 4 Will. IV. c. 27, s. 36, of partition between coparceners, etc. And in those cases where the wants of substantial and universal justice entitle the claimant to relief, but the courts of ordinary jurisdiction are deficient in furnishing a remedy, instances of the third department of equitable jurisdiction, namely, wherein it exercises its functions as auxiliary to the courts of common law, are as follow:—first, the court of equity acts as auxiliary to the ordinary courts of juris-

Auxiliary jurisdiction.

(*c*) 3 Bl. Com. 431; 1 Stor. Eq. Jur. c. iii.; Mitf. Pl.; 1 Fonbl. Tr. on Eq. b. i., c. 1, s. 3, note (*f*).

(*d*) 3 Bl. 432; 1 Stor. Eq. Jur. p. 54, s. 60; also 21 & 22 Vict. c. 27, which gives a power to a court of equity to award damages in certain cases.

diction, where any legal impediment would otherwise be set up against the fair determination of a question depending in a court of law, and thus it will prevent any person, such as a trustee, lessee or mortgagee having a satisfied term of years in possession, from setting up the title against an ejectment, to try a right to land (*e*); secondly, it will compel a discovery which may assist in the administration of justice in a court of law; thirdly, it enables a plantiff to perpetuate the testimony of witnesses, when there appears a well-grounded apprehension that the evidence is such as is material, and likely to be lost by the death or departure from the realm of the only witnesses to the subject-matter of dispute (*f*); and, fourthly, by giving effect to a judgment pronounced in a court of law. It will also protect property pending litigation, by either ordering it to be brought into court, or appointing a receiver to collect the rents of real estates, and the interest of personal property under the control of the court. It will also restrain vexatious litigation in cases where a multitude of actions of precisely the same character may be prosecuted *in infinitum* at law (*g*).

General objects of a court of equity.

The general objects which our courts of equity may be called upon to redress, and which have in some measure been anticipated in the immediately foregoing pages, are, —1st. When the principles of the courts of ordinary jurisdiction acknowledge a right, but their inherent powers are too limited to afford a complete remedy. As where an instrument upon which a legal title is founded has been lost or burnt, and for this reason a court of common law can take no cognizance thereof, equity will, upon an affidavit of such loss or destruction made by the

(*e*) Harris *v.* Southcote, 1 Atk. 540.
(*f*) Philips *v.* Carew, 1 P. Wms. 117.
(*g*) 1 Fonbl. Tr. Eq. b. i., c. 1, s. 3; 3 Bl. Com.

party seeking relief, supply the defect; for "nullus recedat a curiâ cancellariæ sine remedio"(*h*), is an admonition of very ancient date. Also, where a person is injured by the non-fulfilment of an agreement, and cannot have sufficient justice in a court of ordinary jurisdiction, which only gives damages for a breach of the contract, equity will afford its aid, and compel a specific performance.* 2. Where the courts of common law (which can only look at the instrument itself, and not the means whereby it has been obtained), are likely to become the medium of injustice by allowing a party to sue on a bond or note, which has been acquired by fraud or undue influence. In such a case, a court of equity assumes a jurisdiction of restraining proceedings at law, until the circumstances attending the transaction have been thoroughly sifted; and if upon investigation it be proved that the instrument which formed the ground of action was improperly acquired, or in a manner against conscience, the court will order it to be delivered up to be cancelled, and will, as far as possible, place the parties in the same situation in which they stood before. 3. Equity will assist in matters wherein the courts of ordinary jurisdiction are silent, but the principles of universal justice require the interference of the judicial power, as in the case of trusts, which, however strictly a man is bound *in foro conscientiæ*† to perform, were, neverthe-

(*h*) Per Arch. Morton, C., Y. B. tem. 4 Henry VII. fo. 5. *Vide* Spence, Eq. Juris. 578 (a).

* The common law courts may now decree the specific performance of any duty of a public nature in which the plaintiff is personally interested. Com. Law Proc. Act, 1854; Benson *v.* Paul, 6 E. & B. 273; Norris *v.* Irish Land Co., 8 E. & B. 512; Ward *v.* Lowndes, 29 L. J., Q. B. 40.

† From what has been before observed, it will be seen that equity formed a considerable ingredient in the Roman law, and was not wholly unknown to the common law; but it would seem that *conscience*, as a principle of judicial decision, was of a purely clerical

CHAP. II.

less, unknown to the common law, and therefore the Court of Chancery, as the supreme court of conscience, very early took cognizance of them, by holding a party clothed with the character of trustee to a strict performance of his fiduciary obligation; there are, however, certain trusts that are almost as universally remedial in a court of law as by a bill in equity, such as deposits and all manner of bailments, in addition to the implied contract of one person having undertaken to account for money received to another's use, and forms the foundation to an action on the case (*i*). 4. To remove impediments tending to frustrate the fair determination of a question in courts of common law; and equity will for this purpose prevent the adverse party in an action of ejectment from setting up terms, etc., unless such party be a purchaser for a valuable consideration, and without notice of the claimant's title. 5. To provide for the safety of property in dispute, pending the litigation of a question respecting it in any other court of judicature, and will thus enjoin a tenant in possession from committing waste upon an estate which forms the subject of an ejectment in a court of law. To preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or by persons having immediate but partial interests therein—*e. g.* trustees or tenants for life. 6. To restrain the setting up claims of a doubtful nature, by one party, which may in its results lead to an incalculable injury towards another; thus, for

introduction, and incident to their office as spiritual arbitrators of a man's conscience; and it comprehended those moral obligations which resulted from a person being placed in any situation as regards another that would give to the one a right to expect, on the part of the other, the exercise of good faith towards him, nearly resembling the *bona fides* so prominently exhibited in the prætorian code.—Spence, Eq. Juris. 411.

(*i*) 4 Steph. Bl. Comm. 4.

example, in the common case of the infringement of patents, or the publication of books, where the copyright is in the plaintiff, equity will grant an injunction until the question of right can be settled. 7. To prevent a third party from being injured at law, through the doubtful title of others claiming the same object, by compelling such rival claimants to determine their rights by interpleading. 8. To put a bound to vexatious litigation, and to a multiplicity of suits in cases where the courts of ordinary jurisdiction allow of frequent actions concerning the same questions. Thus, where an action of ejectment has been brought to try the title of property in a court of common law (the judgments of such courts not being conclusive), equity will, after repeated trials, interpose by a perpetual injunction, and prevent further litigation in the matter. So when one general right is attempted to be established against several distinct persons, the courts of equity, to prevent a multiplicity of suits, will allow a single bill to be filed for the sake of determining the right against the several defendants. 9. To further the ends of justice, the Court of Chancery will sometimes act as ancillary to other courts, and aid them by compelling a discovery of certain matters essential to the fair trial of the question before them. And, lastly, when the testimony of witnesses is in danger of being lost through the infirmities of age, or other accidents, equity will lend its assistance to perpetuate such testimony, for the purpose of its being afterwards used as evidence in other courts (*l*).

Various branches of the Court of Chancery.

The jurisdiction of the Court of Chancery comprises various branches wherein its authority is exercised. The most important one which, as a court of equity, it exercises, is denominated its extraordinary jurisdiction in contradistinction to its ordinary jurisdiction.

(*l*) Mitf. 4, 111, *et seq.*

CHAPTER III.

THE VARIOUS BRANCHES OF THE COURT OF CHANCERY.

EVERY matter determinable by the chancellor in the Court of Chancery may be classed under one or the other of the following heads:—1, The common law jurisdiction; 2, The statutory jurisdiction; 3, The specially delegated jurisdiction; 4, The equity jurisdiction.* The lat-

* Sir Matthew Hale divides the Court of Chancery into two branches:—I. The equitable, or English, jurisdiction,—although anciently no such thing was known, but its origin, or at any rate its enlargement, might have arisen from two circumstances; first, the usual committing particular petitions in Parliament, not then determined, unto the determination of the chancellor; secondly, by the invention of uses, which were frequent and necessary, especially in times of dissension touching the Crown (p. 46). II. The legal, or Latin, jurisdiction. Under the latter they proceeded against officers of the Court of Chancery by bill, or, on behalf of them, by writ of privilege, until the parties come to issue, and then it is sent into the King's Bench to be tried, and there also judgment is given without remanding it to the Chancery. 2. *Scire facias.*—The king's interest, *e. g.*, the king's right to wards (before the erection of the Court of Wards), and partitions thereupon made, or dower claimed of the wards' land in Chancery, petitions of right, *monstrans* of right, traverses of right, *rege inconsulto.*—Jurisd. of the Lords' House of Parliament, ch. vi.

In such and the like cases, the tituling or state of the Record in Chancery was sometimes *placita in Cancellariâ*, sometimes *placita coram Rege in Cancellariâ.* In this manner, the *Concilium Regis* became intermingled with the Court of Chancery, and derived even the very name of *Concilium Regis* from it,—though, for the most part, with the addition of *Concilium Regis in Cancellariâ.*—*Ibid.* p. 50.

ter jurisdiction is the most important, and more in unison with the principles which gave rise to the establishment of such a court as the Court of Chancery.

Common-law power of the chancellor.

I. By the COMMON LAW the chancellor is invested with various powers. He is privy councillor, and speaker of the House of Lords; he exercises patronage over all the king's livings under the value of twenty marks a year in the king's books (*a*); he is conservator of the peace, and has the right of appointing justices of the peace throughout the kingdom (*b*). It is the duty of the chancellor to summon Parliament, by issuing his writs; whilst all Acts of Parliament are enrolled and deposited in Chancery.

Those branches of the common law jurisdiction of the Court of Chancery which have been made the subject of discussion in the Court, relating chiefly to its ministerial offices, and the privileges of its officers, are generally considered under three heads:—

1. The nomination, etc. of the officers of the court; such as formerly the masters in chancery, and cursitors, who are nominated, admitted, and sworn by the chancellor.

Proceedings in the Petty Bag Office.

2. Proceedings in the Petty Bag Office; where the chancellor holds pleas of *scire facias* to repeal the king's letters-patent, and on petitions of right, *monstrans de droit*, traverses of office, *scire facias* upon recognizances, executions upon statutes, etc., which being registered in this court, the process issued out of the same is made returnable there, and entered in the office denominated the Petty Bag. In this court, also, may be brought any personal action by or against any officer of the Court of Chancery, in respect of his service or attendance (*c*).

3. The ordering of writs to be made out by the cursi-

(*a*) 38 Edw. III. c. 3; 13 Edw. IV. c. 3; and Hen. IV. c. 80.
(*b*) 3 Bl. Comm. 48; Lambard's Just. 28.
(*c*) Madd. Ch. P. v. 1, 5, 3rd ed.

CHAP. III.

tors. The chancellor, by the common law, has the power of issuing all *original writs*, which are returnable into the Queen's Bench or Common Pleas: if returnable in the latter, the original writ may relate to actions *real* or *personal*. The writs (*d*) returnable in the Queen's Bench were (*e*),—1, *Assizes de novel disseisin*; 2, Writs founded upon a supposed personal wrong or force, such as *trespass vi et armis, ejectiones custodiæ, ravishment of ward, ejectione firmæ vi laicâ;* 3, Writs or suits on behalf of the king; 4, *Writs of quare impedit, quare non admisit*, etc.; 5, Writs of replevin; 6, Actions of conspiracy, actions upon the case, and all writs in personal actions, except account, covenant, debt, detinue, and sometimes writs of annuity.*

(*d*) The stat. 2 Will. IV., usually called the "Uniformity of Process Act," virtually annulled all original writs in personal actions.

(*e*) See 3 & 4 Will. IV. c. 27, s. 36.

* The Court was occasionally employed, by a species of collateral jurisdiction, in deciding upon questions, covenants, and agreements, grants of incorporeal hereditaments, releases of right, and declaration of uses, which were entered on the close rolls, and it became the practice to secure the performance of those deeds by recognizance acknowledged in Chancery.—Palg. Counc.

By the 3 & 4 Will. IV. c. 27, all real and mixed actions are abolished, except a writ of right of dower, or writ of dower *unde nihil habet* (which includes a plaint for freebench), or a *quare impedit*, or an ejectment, and no other action, real or mixed, might be brought after the 31st day of December, 1834, and even these last relics of an antiquated procedure were not long permitted to survive their former contemporary writs, for by the 23 & 24 Vict. c. 126, s. 26, no writ of dower, writ of right of dower *unde nihil habet*, and no plaint for freebench, or dower in the nature of any such writ, and no *quare impedit*, shall be brought after the commencement of the Act; but where such writ, etc. would now lie, an action may be commenced by writ of summons issuing out of the Court of Common Pleas in the same manner as the writ of summons in an ordinary

II. Under THE STATUTORY JURISDICTION, or that jurisdiction which is derived entirely from Acts of Parliament, were, till very recently, comprehended the *Court of Delegates*, a *Commission of Review*, and *Bankruptcy*.

Court of Delegates.

Until 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41,—which remove the jurisdiction of the Court of Delegates to the Privy Council,—that Court was the great court of appeal in all ecclesiastical matters, wherein the judges, being composed of lords spiritual and temporal, judges of the court at Westminster, and doctors of the civil law, were appointed by the king's commission under the great seal, and issuing out of Chancery, to represent his person, and to hear all appeals made to him under and by virtue of statute 25 Henry VIII. c. 19, instead of appealing to the Pope, as was the case in all questions arising out of the canon or ecclesiastical law, or when persons had felt themselves aggrieved by a sentence in the ecclesiastical court; which practice of appealing to the Papal chair continued, more or less, from the reign of King Stephen until the passing of the above statute, when the ecclesiastical jurisdiction of the Pope was transferred to the king, as head of the Church (*f*).

Commission of Review.

A Commission of Review (which was also repealed by the above statute, 2 & 3 Will. IV.) was only granted by the king in very special cases, to revise the sentence of the Court of Delegates; as no appeal lay from that Court

action; and see the 15 & 16 Vict. c. 76, for the manner in which proceedings in ejectment are now conducted.

It may also be interesting for the reader to be informed that the last writ of right ever to be tried—and which had commenced before the year 1834—was determined in the Common Pleas on Thursday, December 17th, 1846, at Westminster, before Mr. Justice Coltman and Mr. Justice Maule, and the knights attending on the Grand Assize.—Davies *v.* Lowndes, Law Times, viii. 242; 7 Scott, N. R. 211—213; 6 M. & Gr. 525—527, *S. C.*

(*f*) 3 Bl. 66; 2 Madd. 586.

CHAP. III.

to the House of Lords. This authority was annexed to the crown by the same statute of Henry VIII., when the Church made an exchange of heads—the Pope having in like manner enjoyed the right of granting such commission of review.

Bankruptcy.

Bankruptcy was another branch of the lord chancellor's jurisdiction, derived solely from the legislature, as by the common law the term *bankrupt* is unknown; although the *cessio bonorum* of the civil law (*g*), by which a man surrendered all his goods to be divided among his creditors, might have been, and doubtless was, some guide to the legislators in framing their first acts upon bankruptcy.

34 & 35 Henry VIII. as to bankrupts.

The first statutes concerning bankrupts were 34 & 35 Henry VIII. c. 4, and 13 Eliz. c. 7; and as trade and commerce continued to flourish in England, it was found expedient to amend the laws of bankrupts; and thus statute after statute was passed, upon which the whole system of our bankruptcy laws was erected, and which formed such an important and extensive branch of the chancellor's jurisdiction, until the 6 Geo. IV. c. 16, "An Act to amend the laws relating to bankrupts." This Act was altered and amended by several others, one of which was the 1 & 2 Will. IV. c. 56; whereby the jurisdiction in bankruptcy formerly exercised by the person holding the great seal was, except in case of appeal, transferred to a distinct tribunal styled a Court of Review. This was followed by 3 & 4 Will. IV. c. 47, 1 & 2 Vict. c. 110, 2 Vict. c. 11, 2 & 3 Vict. c. 29; and then came 5 & 6 Vict. c. 122, by which county commissioners were appointed; each one of whom constituted, for a particular district, a permanent Court of Bankruptcy, under the authority of which fiats were issued against traders in that

(*g*) Inst. L. 4, t. 6, s. 40.

district. The entire law relating to bankruptcy was afterwards comprised in the 12 & 13 Vict. c. 106, known as the "Bankrupt Law Consolidation Act, 1849," which, with the exception of some alterations pointed out in the schedule thereto, repealed all the previous Acts. Its general object was to amend and consolidate the laws relating to bankrupts. In addition to all these Acts, however, may be mentioned a more recent one containing but a few sections. This Act, the 17 & 18 Vict. c. 119, August, 1854, was passed "To regulate appointments to offices in the Court of Bankruptcy, and for amending the laws relating to bankrupts." Under its provisions an act of bankruptcy might be committed by merely filing in the Court of Bankruptcy of the district within which a trader may have resided or carried on business for the last six calendar months, a formal declaration, signed by the trader and attested by an attorney or solicitor, that he is unable to meet his engagements (ss. 16, 17); provided a petition for adjudication of bankruptcy be filed within two calendar months (12 & 13 Vict. c. 106, s. 70). A petition for adjudication might therefore have been filed by any trader against himself (id. s. 89); provided he made it appear to the satisfaction of the court, that his available estate was sufficient to produce the sum of £150 at the least, otherwise his petition would be ordered to be dismissed.

There have also been several Acts passed within the last few years relating to *insolvents;* these Acts having for their object the distribution of the estates of persons who might not have fallen under the denomination of *traders*, and were not, therefore, within the scope of the bankrupt laws: for the latter, being unknown to the common law, and purely of a statutory origin, and more confined in their operation, do not come so near the *cessio bonorum* of the Roman law as the law relating to insolvent

CHAP. III.

persons; for a bankrupt, by his certificate, becomes discharged from all his debts provable under the fiat, 5 & 6 Vict. c. 122, whereas an insolvent was never, until the recent Act of 1861, discharged from liability until all his debts were satisfied. This was the condition of the insolvent debtor by the Roman law, whose future effects, even after cessation, were liable to his creditors (*h*).

Various Acts of Parliament have been passed during the last five-and-twenty years, relating to the persons and the estates of insolvent debtors, not being traders; for vesting their estates in an official assignee, in like manner as official assignees held the estates of bankrupts; to assimilate the provisions respecting insolvency to the laws of bankruptcy; to enable certain insolvents, not being traders, to present a petition to the Court of Bankruptcy; to protect them from arrest, and above all to ensure privacy in the proceedings by avoiding public or advertised meetings of creditors; and instead of an assignee that trustees should be appointed by the parties to administer the estate under the control of the court (*i*).

But as it was still deemed expedient to further amend the laws of bankruptcy and insolvency, the Act 24 & 25 Vict. c. 134 was passed, which, by the last section of the Act, was directed to be construed together with so much of "The Bankrupt Law Consolidation Act, 1849," and "The Bankruptcy Act, 1854," as remained unrepealed, as one Act, to be cited for all purposes as the "Bankrupt Act of 1861."

As it would be inconsistent with the nature of this work to give the provisions of the Act in detail, and which can only be acquired by a reference to the Act itself, it

(*h*) Dig. L. 42, 3, 4; Cod. L. 7, tit. 71. See *post*, 5 & 6 Vict. c. 116, s. 9.

(*i*) 1 & 2 Vict. c. 110; 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 7 & 8 Vict. c. 70; 7 & 8 Vict. c. 96; and 8 & 9 Vict. c. 127.

will be sufficient to state that one of its many objects was to abolish the distinction between the laws relating to bankrupts and insolvents, by making them subject to one jurisdiction, called the Court of Bankruptcy; so that all persons, whether traders or non-traders, might by a similar process, except in certain minor matters of detail, be made bankrupts, and after the bankrupt should have passed his last examination, the court was empowered to grant him an order of discharge, which had the effect, whether the bankrupt had been a trader or not, of discharging him from all debts, claims or demands provable under his bankruptcy, save as therein otherwise provided (s. 161).

Provision was also made under the Act of 1861, s. 86, for a debtor to obtain an adjudication of bankruptcy against himself, and the filing such petition was to be deemed an act of bankruptcy.

During all these changes an appellate jurisdiction was retained in Chancery.

By the Act of 1861 a limited jurisdiction in Bankruptcy was conferred upon the county courts outside the district of the London Court of Bankruptcy.

The last Acts upon the subject are the Bankruptcy Repeal and Insolvent Court Act (32 & 33 Vict. c. 83), vesting the jurisdiction in relation to matters then pending in the Insolvent Debtors' Court in the Court of Bankruptcy, and the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), giving the jurisdiction to a chief judge in bankruptcy, with a primary jurisdiction in country cases to the county courts, from which an appeal lies to the chief judge, and providing an appeal to the Court of Appeal in Chancery from the decisions, whether primary or appellant, of the chief judge.

It may be mentioned that a debtor cannot now file a petition to make himself bankrupt, but he may file a

CHAP. III.

petition for the liquidation of his affairs by arrangement, and the court may adjudge him bankrupt if satisfied that the liquidation cannot proceed without injustice or undue delay to the creditors or the debtor.

7 & 8 Vict. c. 111.

In addition to these several Acts relating to bankruptcy and insolvency, it may be sufficient to mention the 7 & 8 Vict. c. 111, "An Act for facilitating the winding-up the affairs of joint-stock companies unable to meet their pecuniary engagements," and the 9 & 10 Vict. c. 28, passed to facilitate the dissolution and winding-up in Chancery of certain railway companies.

9 & 10 Vict. c. 28.

The winding-up of trading companies is now usually effected in Chancery on petition under "The Companies Act, 1862," for the incorporation, regulation and winding-up of trading companies and other associations.

Other branches of the statutory jurisdiction relate to charities, and are conferred or regulated by Sir Samuel Romilly's Act (52 Geo. III. c. 101); Charitable Trusts Acts, 1853, 1855, 1860; Grammar School Act (3 & 4 Vict. c. 77); Church Building Amendment Act (8 & 9 Vict. c. 70); Burial Acts (15 & 16 Vict. c. 85, s. 29; 16 & 17 Vict. c. 134); Municipal Corporations Act (5 & 6 Will. IV. c. 76); Charitable Uses Acts (27 & 28 Vict. c. 13, s. 3). Jurisdiction is also conferred upon the Court of Chancery by the Trustee Relief Acts (10 & 11 Vict. c. 96 and 12 & 13 Vict. c. 74), as to the payment into court by trustees of trust funds and their subsequent disposal: by the Trustee Acts, 1850 and 1852, as to dealing with the estates of trustees and mortgagees where they are under personal disability, or where, from other causes, the parties beneficially interested are unable to obtain suitable conveyances and transfers and for the appointment of new trustees by the Court—the powers and authorities conferred by the Acts extending to lands and personalty in the colonies: by the Leases and Sales

of Settled Estates Acts, 1856, 1858 and 1864, empowering the court to authorize such leases and sales in certain cases: by the Parliamentary Deposits Act (9 & 10 Vict. c. 20), as to the payment into the Court of Chancery of deposits required by the standing orders of either House of Parliament to be made by the subscribers to any undertaking, and the disposal thereof: by the Lands Clauses Consolidation Acts (8 & 9 Vict. c. 18 and 23 & 24 Vict. c. 106), as to the payment into court of deposit and purchase and compensation moneys in respect of lands, &c. taken under those acts, and the disposal thereof; by 9 & 10 Will. III. c. 15, and the Common Law Procedure Act, 1854, as to awards made rules of the court of equity: by 6 Anne, c. 18, as to the production of cestui que vie on the demand of the reversioner, &c.: by the Legacy Duty Act (36 Geo. III. c. 52), as to payment into court of any legacy or residue of personalty, after deducting legacy duty, where the owner is an infant or beyond seas, the discharge of the executor, &c., and the disposal of the fund: by the Land Tax Redemption Acts (42 Geo. III. c. 116, s. 67, and 16 & 17 Vict. c. 117), facilitating sales of timber or part of an estate by the owners of beneficial but limited interests therein for redemption of land tax: by the Unclaimed Stock Acts (56 Geo. III. c. 60, s. 5; 8 & 9 Vict. c. 62; 24 & 25 Vict. c. 3, s. 8), enabling a party who claims any stock or dividends which have been transferred or paid to the commissioners for the reduction of the national debt, and who cannot satisfy the bank of the validity of his claim, to apply by petition to the Court of Chancery: by the Property Law Amendment Act (11 Geo. IV. & 1 Will. IV. c. 65, s. 12), as to authorizing the surrender and renewal of leases belonging to infants or feme coverts: by the Fines and Recoveries Act (3 & 4 Will. IV. c. 74, s. 33), making the lord chancellor protector of a settlement in place of a lunatic, and the

CHAP. III.

Court of Chancery in place of a traitor, felon, infant or person whose existence is uncertain : by 4 & 5 Will. IV. c. 29, giving the court power to authorize on behalf of infants, unborn children or lunatics, investments of trust funds in real securities in Ireland : by 2 & 3 Vict. c. 54, as to the custody of infants : by the Copyhold Enfranchisement Acts, 1841, 1843, 1852, 1858, as to the payment into court and application of compensation moneys for enfranchisement where persons have only limited interests, &c. in manors : by 5 & 6 Vict. c. 26, s. 12, as to moneys payable by ecclesiastical corporations on sales or enfranchisements made to them by certain persons : by the Defence Acts, 1842, 1860, as to the compensation moneys paid for land or any interest therein taken for the purposes of the Defence Acts : by the 8 & 9 Vict. c. 56, as to sanctioning improvements in land by drainage and otherwise, and the charging the cost on the lands : by 8 & 9 Vict. c. 118, as to payment into court and disposal of moneys payable under commons inclosures ; by the Merchant Shipping Act, 1854, as to ordering the sale of a share in a ship become vested in anyone not qualified to be a British shipowner : by the Law of Property and Trustees' Relief Amendment Act (22 & 23 Vict. c. 35), as to establishing sales under powers in some cases, and enabling trustees without a suit to take the opinion and advice of the court : by the Land Transfer Act (25 & 26 Vict. c. 53), and the Declaration of Title Act, 1862 : by the Confirmation of Sales Act (25 & 26 Vict. c. 108), as to sanctioning sales by trustees of land and minerals separately : and by the Mortgage Debenture Act, 1865. In most of these matters the application has to be made to the court in a summary way by petition.

Specially delegated jurisdiction.

III. THE SPECIALLY DELEGATED JURISDICTION is that which concerns the administration of idiots' and lunatics' estates. It is a special commission under a warrant of

the king's sign-manual, who, as general conservator of his people, has authority over idiots and lunatics, and the care of their estates. The warrant is countersigned by the lords of the treasury, not directed to the Court of Chancery, but some great officer of the crown. It is not necessary that he should be the person who holds the great seal, although most usually given to him by the warrant, in consideration of its being his duty as chancellor to issue commissions of lunacy and idiocy. This warrant does not confer jurisdiction but only a power of administration. If that power, therefore, be abused, or any wrong done, or error committed, the appeal is immediately to the king in council (Oxenden *v.* Lord Compton, 2 Ves. jun. 71 ; Wigg *v.* Tiler, 2 Dick. 552 ; 2 Madd. 724). This warrant is issued by the king, to avoid solicitations and undue influence of parties seeking to become committees of the lunatic, it having been formerly the custom of the crown to entrust him to the care of proper persons (*j*).

Whatever doubts exist with respect to the origin of the *extraordinary* jurisdiction, by means of courts separate and independent of the courts of common law, wherein the ordinary course of justice is usually administered, or within what limits this jurisdiction was originally confined, it is certain that the extent of their powers and duties have from time to time gradually ripened, and are now settled down into a permanent and well-grounded authority.

Equitable jurisdiction; how divided.

IV. THE EQUITABLE JURISDICTION of the Court of Chancery has been treated of under the following heads : —1, Accident and Mistake ; 2, Account ; 3, Fraud ; 4, Infants ; 5, Specific Performance of Agreements ; 6, Trusts. Although it may be difficult to see how the manifold

(*j*) 3 Bl. 427.

CHAP. III. doctrines arising out of the equity jurisdiction can be included even under this enlarged classification, yet, by consulting the divisions and subdivisions of each branch, it will be found that without any very arbitrary arrangement these heads include every branch of equity (*k*).

(*k*) 1 Madd. Ch. Pr. 39.

PART II.

THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY.

CHAPTER I.

ACCIDENT AND MISTAKE.

Accident and mistake, when relieved against.

THIS useful branch of the chancellor's jurisdiction has been recognized from an early period of our legal history; and perhaps the most ordinary cases in which application is made to a court of equity for relief in respect of accident, is where a deed or instrument on which a title is founded happens to be lost or burnt, or where it has been cancelled by mistake. The court will in such events afford the same relief as might be obtained at law if the instruments were in existence.

Whenever the interference of the court is invoked in matters of mistake or inadvertence, it proceeds upon the broad principles of natural justice or conscience. Its jurisdiction is said to have been originally exercised in cases of penalty and forfeiture: as, for example, where, under an obligation to pay money, the obligor paid it and took no acquittance or an acquittance without seal; or where the money was paid *within a short time* after the day: if judgment were had in any of such cases at law,

CHAP. I.

equity would give relief. So, where a party had been prevented by inevitable accident from doing any act which he had bound himself to perform, the party might in like manner have relief from his obligation (*a*).

Difference of practice, where discovery only and where relief is sought upon a lost instrument.

It seems that when only a discovery of a deed or instrument upon which the demand arises is sought, an affidavit of the loss is unnecessary; for it is presumed that no person who is in possession of the instrument would file a bill for a discovery of it, especially when the expense of a discovery-bill falls upon the plaintiff. But when relief is sought beyond the discovery, in consequence of the loss or destruction of an instrument from which the plaintiff derives his title, an affidavit of such loss must be annexed to the bill; which affidavit is required not as evidence of the loss, but as a security for the propriety of the jurisdiction (*b*); for the court will not permit a bare suggestion to support its jurisdiction in a matter in other respects clearly cognizable in a court of law, but will require a degree of proof of the ground on which it is sought to transfer the jurisdiction from a common-law court to a court of equity, otherwise a demurrer will be allowed (*c*). The averment which is inserted in every bill praying relief, for the purpose of giving the court jurisdiction, is not sufficient, as no bill is put in upon oath of the parties.

Principle upon which equity relieves against accident.

It is upon the ground of accident that equity relieves against penalties; but this relief is administered only where the other party sustains no injury by such interference: for if the party cannot be placed in a condition equally advantageous as if the agreement had been performed, the court will not relieve. It will only afford assistance in cases *where the act may be performed after-*

(*a*) *Vide* Spence, Eq. Jurisd. (*b*) 9 Ves. 466.
(*c*) Mitf. 124, 4th ed.

wards, or a compensation made in respect of it: such compensation, however, must be full and complete, so as to restore the party precisely to his former situation.

When payment of money is considered as a penalty, and when not.

Where covenants for the performance of several things are contained in articles, and a large sum of money is stated at the end to be paid upon non-performance of the agreement, that must be considered as a penalty; but where the contract provides that, if a party do a particular thing, such a sum shall be paid by him, then the amount stated may be treated as liquidated damages (*d*).

Where a penalty is merely inserted in an instrument, for securing the enjoyment of some collateral object.

Whenever a penalty is intended merely for securing the enjoyment of some collateral object, such enjoyment is regarded as the principal intent of the deed, and the penalty only as accessorial, or, in other words, as a mere security for the amount of damage actually incurred. Should, therefore, the penalty of the bond be sued for at law, the court, upon application of the defendant, will grant an injunction, and an issue *quantum damnificatur* will be directed. In all cases where penalties are inserted, in the event of non-performance, one party cannot in equity absolve himself from the contract by electing to pay the penalty, if the performance be insisted on by the other party, for the court looks upon the bond as an agreement, unless it appear from the wording of the instrument to have been the intention of the parties that the obligor should have his option of either doing the act agreed upon, or paying the penalty (*e*).

Doctrine of "once a mortgage always a mortgage."

Another instance in which the equitable principle may be seen is in the case of a mortgage, with respect to its redeemable character. It is an old maxim, that "once a mortgage always a mortgage." Proceeding upon this principle, the right of redemption—or, as it is technically

(*d*) 1 Madd. Ch. 41—52, 3rd ed.; and *vide* the cases cited.
(*e*) Ibid. 59. *Vide infra.*

CHAP. I.

called, *the equity of redemption*—is considered as an inseparable incident to a mortgage, and cannot be defeated, or even controlled, by any agreement between the parties. There, if it can be collected from the instrument by any fair interpretation that it was the intention to create a mortgage *ab origine*, and not an absolute conveyance, the Court of Chancery will regard any stipulation tending to fetter the right to redeem of no effect whatever; and will look upon such a stipulation in the light of a penalty annexed by the parties to the payment of the money, and therefore relievable in equity, in the same manner as it interferes in the ordinary case of a mortgage which has become absolute at law (*f*).

Redemption —as to mortgages.

This doctrine of redemption, as applied to mortgages, was so equitable in itself that, when once broached and acted upon, it gradually increased in favour until the reign of James I., although the common-law judges, in their anxiety to preserve the ancient landmarks of the law, at first regarded it with their usual mistrust and jealousy: for, during the reign of Charles I. it became fully established that a mortgagor might redeem his estate in a court of equity even after the day appointed for payment; and bills of foreclosure began to be filed by mortgagees to bar or foreclose the right to redeem, unless payment were made by a certain day named. Indeed, when once the courts of equity had assumed the right of treating a mortgage as being merely a security for the debt, and by application of its own principles regarded the mortgagee, after the estate had become forfeited at law, as a *trustee* of that estate for the mortgagor (*g*), the judges of those courts seemed to be fully resolved to indemnify themselves for having been so long excluded

(*f*) 7 Ves. 273; Coote on Mortg. 19, 2nd ed.; 5 Jarm. and Sweet, 80.

(*g*) Seton *v.* Slade, 7 Ves. 283.

from the exercise of so salutary an interference; and Sir J. Finch, L. K., went even so far as to declare that he would enforce the equity of redemption against parties until the tenth generation, because it was supposed that he could not purchase without having either actual or constructive notice of the mortgage (*h*). This was doubtless regarded by the common law judges as a piece of flippant bravery; for Sir Matthew Hale, in the latter part of the next reign, referring to this stretch of power assumed by the equity courts, declared that by the growth of equity on equity the heart of the common law was eaten out, and legal settlements destroyed. "In the reign of Richard II.," says that eminent judge, "the Parliament would not admit of redemption, but now there is another settled course: as far as the time is given man will go; and, if a hundred years are given, man will go so far, and we know not whither we shall go" (*i*).

Stat. 7 Geo. II. c. 20, in behalf of mortgagors.

The doctrine of the equity courts, in respect to these innovations, however, became so agreeable to sound reason and justice that the legislature afterwards took up the matter, for the sake of bringing the common law to recognize and adopt the same principles; and thus 7 Geo. II. c. 20, provides that, where there is an action brought by any mortgagee for the recovery of possession of any mortgaged lands, and there is no suit then depending to foreclose such mortgage, and the defendant shall, depending such action, pay to the mortgagee the principal, interest, and costs, it shall be deemed a satisfaction, and the court may compel the mortgagee to surrender the premises.

Case in which the court will,

Although, in a bill of foreclosure, an order to enlarge the time for payment of the mortgage money is by no

(*h*) Bacon *v.* Bacon, Toth. 199, temp. Car. I.

(*i*) Roscarrick *v.* Barton, 1 Ch. Cas. 219.

CHAP. I.

in a foreclosure suit, enlarge the time for payment.

means of course (*j*), yet the court will grant such indulgence under meritorious circumstances, rather than allow a mortgagee, by foreclosure, to obtain an estate greatly exceeding the value of the debt. Thus, where the time fixed for payment was the 31st of July, the mortgagor made default on that day, although he had the money ready to advance, but was prevented by illness from coming to London for that purpose; thus circumstanced, he deputed his wife to come up with the money; but, in consequence of the only London coach which passed near his residence being full on the 30th of July, his wife could not reach town with the money until after the 31st, which alone prevented it being paid on that day,—a motion for a further extension of time was allowed (*k*). In a foreclosure suit, the two questions are—first, whether there be a mortgage? and, secondly, if there be, then what is due upon it (*l*)?

Penalty in a bond; origin of.

It will appear rather surprising, if we recur to those principles of conscience and equity which seem to have been regarded with such favour, and enforced by the ecclesiastical judges whenever an occasion presented itself in opposition to the severer rules of the common law, that the penalty inserted in a bond should have so long escaped their animadversion, and that some expedient at least should not have been attempted in order to relieve an unfortunate obligor from the full amount of penalty, at once so absurd and so unjust. It serves, however, as a proof of the contradiction and inconsistency into which men are prone to fall, merely for the sake of maintaining some favourite theory or scholastic dogma; and, in order to avoid a principle at variance with their system, adopt

(*j*) Eyre *v.* Hanson, 2 Bea. 478.

(*k*) Jones *v.* Creswicke, 9 Sim. 304; Ford *v.* Wastell, Law Times, ix. 373.

(*l*) Atkin, Convey. 465.

Erroneous doctrine of ecclesiastical writers, in reference to taking interest upon loans.

an evil of tenfold magnitude. Thus, the monkish scholiasts appear, for a considerable period, enamoured with the Aristotelian notion that money is naturally barren, and to make it produce money is preposterous, and contrary to its original design. These writers also fancied that the taking of usury or interest for the loan of money was hostile to the spirit of Christianity, and therefore set their faces most resolutely against it. But it was very soon discovered that, unless mankind had no other inducement to lend their money except the trouble and risk of recovering it, they would choose the safer course of keeping it in their own possession. The clerical judges, however, rather than sacrifice their theory, by fixing a moderate and unoppressive rate of interest upon borrowed capital, allowed the penalty in the bond (usually double of the sum borrowed) to be enforced against the miserable debtor, on default of paying the principal at the time agreed upon; he was thus, by ecclesiastical foresight and the decisions of the judges, preserved indeed from splitting upon the Scylla of usury; but, at the same time, he not unfrequently became engulfed in the Charybdis of their own invention.

Penalty—an evasion of the monkish doctrine.

But the penalty of the bond being a contrivance to evade the monkish constitutions was, in the estimation of the courts of law, regarded as the real debt, which Blackstone considers very pardonable in the judges of those courts to enforce, because, as the law then stood, they could not give judgment for the payment of interest; but afterwards, when the genius of commerce broke through these refined meshes of monkish ingenuity, and the judges in the courts of equity began to open their eyes to the "just and true intent of the penalty," to which they had been directed by the 37 Henry VIII. c. 9,*

* The words referred to are—"That the Act shall not extend to any lawful obligation indorsed with consideration, nor to any sta-

CHAP. I.

s. 6, they* thenceforth construed the penalty, as intended by the parties, to be merely a security for the loan, and as it is regarded in the present day—*i. e.* a security for the principal, interest, and costs, occasioned by the necessity of suing upon the bond. For some time, however, after the passing of this Act, the narrow-minded successors to these clerical theorists "still adhered, wilfully and technically, to the letter of the ancient precedents, and refused to construe the payment of principal, interest, and costs, as a full satisfaction of the bond."† The difference of construction which the courts of law and equity put upon the penalty of the bond occasioned the interference of Parliament, which (as it did some few years afterwards in respect to mortgages, and to which allusion has just been made) seemed to have adopted the principles of the courts of equity; for, by the stat. 5 Anne, c. 16, s. 12, it was declared that "when an action of debt is brought upon any bond, which hath a condition or defeasance to make void the same upon payment of a lesser sum, at a day or place certain, if the obligor, his heirs, executors, or administrators, have, before the action

Statute 5 Anne, c. 16, s. 12.

tute or recognizance made, or to be made, for the payment of a lesser sum; so that the same obligation, statute, or recognizance, be made for a true, just, and perfect debt, or for the performance of any other true covenants made, or to be made, upon a just and true intent had between the parties, other than in cases of usury, interest, corrupt bargains, shifts, or chevisance."

* The equity judges, it will be remembered, about this time ceased, as a rule, to be taken from the ecclesiastical body, since we find only three more dignitaries of the Church who became chancellors after the death of Henry VIII.—these were Goodrich, Bishop of Ely, from 22nd December, 1551, to July 20th, 1553; Stephen Gardyner, Bishop of Winchester, from August 23rd, 1553, to 12th November, 1555, and John Williams, Archbishop of York, from July 10th, 1621, to 25th October, 1625 (*supra*, p. 43).

† 3 Bl. 435.

brought, paid to the obligee, his executors, or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition of defeasance; yet it shall, and may, nevertheless, be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place, according to the condition of defeasance."

Equitable relief, in case of a lost bond or note of hand, in consequence of the necessity of *profert* and *oyer* at law.

It was once held that, in case of the loss of a bond (except a voluntary bond), relief would be afforded in a court of equity, upon the principle that at law a party could not recover without a *profert*, and giving *oyer* of the bond; but that no relief could be obtained in equity for a lost note, upon the converse of that principle—viz. that, in proceeding to recover upon a lost note at law, *profert* and *oyer* were not necessary (*m*). It became a matter of doubt, however, whether the latter doctrine ever was a sound one; and it was determined, subsequently, that the plaintiff at law is bound to deliver up the note to the defendant as a security to him against further actions or demands by other persons having a right to sue on the negociable instrument—that the common law courts cannot substitute and insist upon an indemnity, but that if the bill in equity for relief and payment offers such indemnity, the court can enforce such offer and do complete justice (*n*). But by the Common Law Procedure Act of 1852, 15 & 16 Vict. c. 76, s. 55, *profert* and *oyer* are abolished.

Where a bill of exchange has been destroyed a court of equity has no jurisdiction to afford relief, since there

(*m*) See Madd. Pr. 1, and the cases cited in the margin; Ward *v.* Turner, 2 Ves. 31 (n); *Ex parte* Greeneway, 6 Ves. 812; East India Company *v.* Boddam, 9 Ves. 464.

(*n*) Hansard *v.* Robinson, 7 B. & Cr. 90; Story, Eq. Jur., ss. 95, 96.

CHAP. I.

always existed a complete remedy at law in such cases (*o*).

Relief in cases of mistakes in written contracts.

A court of equity assumes a jurisdiction to interfere in cases of a palpable mistake in written contracts, as it does against frauds; and thus, where an agreement has been entered into for a *valuable consideration*, equity will relieve against a mistake in the execution of it (*p*).

Before the 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106, a conveyance by way of feoffment was not good by the common law unless accompanied by livery of seisin; but equity supplied the defect of such an imperfect conveyance (*q*).

Mistake in the intended method of conveying an estate relieved against.

So equity will afford its aid for the purpose of effectuating the intention of the party, where a man has manifested his intention of disposing of his estate, and mistakes the mode of doing it, provided the instrument be sufficiently valid to carry out the intention of the party within the limits of legal demand. Thus, when a person making a feoffment in fee neglects to convey by livery of seisin, equity (since it was evidently the intention of the party to convey by the common-law assurance) supplies the want of formality of livery, *ut res magis valeat quam pereat*, by decreeing that the conveyance shall operate as a covenant to stand seised under the Statute of Uses: in like manner, a bargain and sale enrolled, when there has been a sufficient consideration, has been allowed to take effect as a covenant to stand seised to support the intention of the parties (*r*).

A court of equity will also give relief where a person claims some benefit under a will, and insists at the same time on claiming, under a different title, property which

(*o*) Wright *v.* Lord Maidstone, 1 K. & J. 701.

(*p*) Goring *v.* Nash, 3 Atk. 188; Williams *v.* Codrington, 1 Ves. 514.

(*q*) 1 Madd. 50.

(*r*) Fonbl. Eq. 47.

the testator through an erroneous impression that it was his own, disposed of otherwise, under the same will: thus, in the case of Rutten *v.* Maclean (*s*), where a testator, conceiving himself entitled to the property belonging to his wife, made a general disposition of the whole of his estate, and gave her some other property by the same will, the court decreed that she should elect, and that she could not insist on taking the interest bequeathed to her under the will, and yet retain the property which formed the subject of his general disposition.

Election: upon what principle founded.

The doctrine of election is founded on the principle "that a person shall not claim any interest under an instrument, whether it be a deed or a will, without giving full effect to that instrument as far as he can;" or, in other words, if he receive a benefit from the instrument, he shall not be allowed to defeat any of its provisions in favour of other persons. It can only happen where a person has a decided interest before, and a certain benefit left him by will: for, in the absence of such certainty of interest, there can be no election (*t*).

Defects in the execution of powers, and also the defective surrender of copyholds, relieved in a court of equity.

Defects in the execution of powers, as also the defective surrender of copyholds, have been relieved against, especially where there has been a valuable consideration (*u*) inducing the execution or surrender, or where the execution of the power has been exercised in favour of an intended husband or younger children, or a wife, who, in this respect, stand upon an equality with purchasers or creditors, or in favour of a charity (*x*). Equity

(*s*) 4 Ves. 531.

(*t*) 2 Madd. 62—67. As to what amounts to election, see Briscoe *v.* Briscoe, 1 Jones & Latouche, 335; 9 Jur. Dig. 226. See also Wall *v.* Wall, 11 Jur. 403.

(*u*) Chapman *v.* Gibson, 2 Bro. C. C. 229.

(*x*) Wilkie *v.* Holme, 1 Dick. 165; Shannon *v.* Bradstreet, 1 Sch. & Lef. 60; Harrington *v.* Haste, 1 Co. 131.

CHAP. I.

will also relieve a defect in the execution of a power of leasing where such defect will not operate as a fraud upon the remainderman—or the mode of executing the power is merely defective, as where the attestation is by one witness only, when two are required, or if a seal be wanting—provided the lessee be, as before observed, in the nature of a purchaser (*y*): but the court will not help a voluntary defective conveyance, which cannot operate at law, in favour of a bare volunteer. Thus, where a man, seised in fee of freehold and copyhold lands, settled the freehold land on himself for life, remainder to the heirs male of his body, remainder to plaintiff, his brother, in tail, and covenanted to surrender the copyhold lands to the same uses,—and going to make a surrender, in pursuance of his covenant, fell sick by the way, but made a letter of attorney to do it, and died before it was completed — without issue male; the copyhold lands descended to his daughters, who were his heirs-at-law. The bill was filed by the brother, to have the defect of the surrender supplied in equity; but the court refused it, on the ground that the brother was but a mere volunteer,—the heir-at-law having an equal equity with a volunteer (*z*).

Where the formalities required in exercising a power become impossible.

Independently, however, of the instances of purchasers, creditors, and wife and children, there are some others in which the court will interpose to supply the defective execution of a power, so as to prevent a resulting trust in favour of the heir of the donor,—as when the volunteer claims, under a power, the terms of which by accident become impossible to be executed; for a court relieves against all manner of accidents, since it is unconscionable to take advantage of them: therefore, if a man make a

(*y*) Doe *v.* Weller, 7 Durnf. & East, 478; Willis, 176; Attorney-General *v.* Griffith, 13 Ves. 576.

(*z*) Francis's Max. 14 (Cas. 15).

conveyance, with a power of revocation, in the presence of four privy councillors, and he is sent by the reigning monarch to Jamaica, where that circumstance becomes impossible, there equity will allow him to revoke without it (*a*).

Non-execution.

Relief is not given in cases of non-execution of powers, unless where the power is such as a court of equity considers as partaking so much of the nature and qualities of a trust, that it becomes the duty of the party to whom it is given to execute it: in which case, should the donee die before he has discharged that duty, the court will supply the non-execution of the power (*b*). Relief will also be given where the execution of the power has been prevented by fraud (*c*).

Marriage settlements, in pursuance of articles.

But the most usual case in which the court has been called upon to afford its aid against *mistake*, is the case of settlements executed subsequent to marriage, purporting to be made in execution of articles entered into before marriage. And thus, where in such cases the court is called upon to interpret articles which in their strict legal operation would create a limitation in tail, it will look at the motive of the settler, and presume that he intended rather to benefit the children of the marriage than the parties themselves. Therefore, where the words of the articles would by operation of law create an estate tail, and so give the parents a power to defeat the intention of the settler by barring the issue, equity will, on the

(*a*) *Vide* Fonbl. Tr. Eq. b. i. c. 5 (h), and the case of Bath *v.* Montague, 3 Ch. Cas. 68, referred to.

(*b*) 1 Madd. Ch. 75; Watk. Conv., by Morley and Coote, 8th ed., 267 (n).

(*c*) 3 Ch. Cas. 83, 84, 122; Vane *v.* Fletcher, 1 P. Wms. 354; Pigott *v.* Penrice, Prec. Ch. 471; Luttrell *v.* Olmius, cited 11 Ves. 683; Bulkley *v.* Wilford, 2 C. & Fin. 102; Middleton *v.* Middleton, 1 J. & W. 94.

CHAP. I.

ground of a mistake, decree a strict settlement, and so frame the instrument that the main objects, namely, the issue of the marriage, shall not be defeated of the provision intended by the articles of settlement (*d*).

Articles; in what light viewed by the court.

The general principle upon which the court proceeds in marriage articles thus framed is, that articles made previous to, and in consideration of, marriage, are considered rather as instructions for settlements than as instruments complete in themselves;—or as "heads of agreement," to be afterwards drawn out at length, according to the usual course of such settlements, and that a provision for the children is one of the great and immediate objects of this agreement (*e*).

The court does not interfere where both articles and settlement are made before marriage, unless, etc.

But the court will not interfere where both the articles and settlement are made *before* the marriage, unless the settlement in such case be expressly made in pursuance of the articles; neither will equity reform a marriage settlement on the ground of mistake, unless the evidence as to the mistake, and the real intention of the parties, be perfectly clear and satisfactory: insomuch that where from other provisions or limitations in other lands, it appears that the party knew and intended the distinction, or where by a difference in the penning the parties intended to leave a portion in the father's power, a strict settlement will not be decreed (*f*). Thus, where by articles part of an estate is limited to the father for life, remainder to the wife for life, remainder to the first and every other son and daughter in tail, and another part to the father for life, and the heirs male of his body by that wife, Lord Macclesfield said, if the latter had been the sole limitation, he should without scruple decree a

(*d*) Fearne, Cont. Rem. 112.

(*e*) 1 Madd. 84; Watk. Conv., by Morley and Coote, 246-7.

(*f*) Marquess of Breadalbane *v.* Marquess of Chandos, 2 My. & Cr. 740; Howel *v.* Howel, 2 Ves. 358.

strict settlement according to the common rule; but where the parties had shown that they knew the distinction, when to put it out of the power of the father, and when to leave it in his power, he would not vary the last limitation,—decreeing to the father in tail as to the last, though not as to the first limitation.

Evidence may be adduced for the purpose of showing that the articles constituted the final agreement between the parties, and that the discrepancy between the articles and the settlement arose from mistake, and upon proof of those facts the court will rectify the settlement (*g*): but to justify such a course a clear intention must be proved; for, if there be merely evidence of doubtful or ambiguous words, the settlement itself is the construction which the parties themselves have put upon those words and which the court will uphold (*h*).

It appears also that where both the contracting parties have been led into an error, and the subject on which the mistake arose was from its nature doubtful at the time of the agreement, and neither of the parties were cognisant of it, equity will not give relief (*i*).

Nor will the court correct an instrument made upon the marriage of two parties, upon the ground of a mistake on the part of one only of those parties (*k*).

Lord Justice Turner, in Bentley *v.* Mackay (*l*),—referring to the general rule that in order to induce the court to rectify an instrument on the ground of mistake it was necessary it should be the concurrent mistake of all the parties,—observed that in the ordinary case of rectifying

(*g*) Bold *v.* Hutchinson, 5 De G., Mac. & G. 558, 568.

(*h*) Marquess of Breadalbane *v.* Marquess of Chandos, 2 My. & Cr. 739.

(*i*) Mortimer *v.* Capper, 1 Bro. C. C. 158.

(*k*) Sells *v.* Sells, L. T., N. S. vol. 3, 299.

(*l*) L. T., N. S. vol. 7, 146.

CHAP. I.

mistakes in an instrument, where it is sought to alter the instrument in any prescribed or definite mode, the rule was that in such cases it is necessary to prove not only an existing mistake in what had been done, but also to prove what was intended to be done, in order that the instrument might be set right according to what was really so intended—for in such a case, if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument.

Mistake in wills, etc., where the error is patent.

Equity will also lend its aid for the purpose of relieving against mistake in wills or other documents of a testamentary nature, especially when the mistake is so evident as to show in itself that it was quite contrary to the intention of the testator. But it is said that where a court of equity interferes to rectify a mistake in a will, it *must be apparent on the face of the will* (*m*); and where the expressions made use of in the will are clear and positive, however their legal sense may operate against the intention of the testator, equity cannot admit parol evidence to show the mistake and point out the true meaning of the testator. Thus, where in his will the testator has finally limited his estate without any reference to a further execution thereof by a conveyance (*n*)—that is, where there is nothing left to be done under the direction of the court in reference to the trust, but the limitation is irrevocable, and so completely declared as to take effect by the very deed which conveys the legal estate to the trustee—it is called a *trust executed*, and such a limitation must take its course at the common law; for, as a testator may give what estate he pleases, so far as his power over the property extends, it follows that, when he

(*m*) Whitfield *v.* Clement, 1 Meriv. 402.

(*n*) Fearne, Cont. Rem. 143, 8th ed.; Walk. Convey., by Morley and Coote, 245.

has clearly and finally devised his estate, by expressions carrying a certain unequivocal import, the court has no right to presume that he intended to convey his estate differently from what he has expressly declared.

Trust executed.

If, therefore, he direct his trustee to convey an estate to A. and the heirs of his body (*o*), A. takes the estate as a conveyance at common law—that is, an estate tail—and no evidence dehors the will can be admitted to prove the object of the testator was to give only a life estate to A.; and if, by any other instrument, a person has created a trust in such a manner as to render it conclusive against himself, it is an executed trust.

Trust executory.

But when the trust is said to be *executory*—that is, where the limitations are incomplete, and are to be carried into execution by some future act to be done by the trustee, as where the testator has directed his trustees to *convey*, etc., and has clearly expressed his intention, or it may be clearly implied from the words of the will that he intended only to give a life estate to the first tenant—equity will, in such a case, by analogy to the instance of marriage articles, of which we have before spoken, interfere, and mould the conveyance so as best to meet the intention of the testator (*p*); and thus, instead of creating an entail, will limit the estate in strict settlement, by giving only a bare estate for life, with remainder to the issue in tail.

Difference between a creditor and a volunteer claiming under an executory trust.

There is this distinction also observed in a court of equity, in respect to the interests of volunteers claiming the benefit of a trust. "A declaration of trust," says Lord Langdale (2 Keen, 134), "is considered, in a court of equity, as equivalent to a transfer of the legal interest in a court of law; and if the transaction by which the trust is created be *complete* it will not be disturbed *for*

(*o*) Legate *v.* Sewell, 1 P. Wms. 142.
(*p*) Marryat *v.* Townley, 1 Ves. 130.

CHAP. I.

want of consideration: if the transaction rest upon an agreement not conferring the legal interest—if it be an *executory* contract—this court, in the absence of consideration, will not give effect to it." Where also a will is cancelled by mistake, or on the supposition that a later will is good, which proves to be invalid, this circumstance does not let in the heir, but will be relieved against in a court of equity (*q*). Equity will also correct a mistake in the name of a legatee in his favour, by circumstances of description sufficient to point out the party intended to take. "Nihil facit nominis error cum de personâ constat" (*r*).

Exception to the rule "Ignorantia juris non excusat."

The courts of equity have, in many instances, abated the rigour of the old and favourite maxim, "Ignorantia juris non excusat," by holding that it was in regard to the public that ignorance cannot be pleaded in excuse of crimes, but does not hold in civil cases (*s*): and equity has, in several instances, relieved the party from the effects of a contract founded on a misapprehension of *law;* and Lord Thurlow once said that money paid on a mistaken notion of *law* might be set right at any length of time (*t*): and it is now a settled rule that, whenever one contracting party is ignorant of his rights, and that ignorance is taken advantage of by the other, equity will relieve (*u*). But in the absence of any evidence of fraud, equity will only relieve where the mistake is one

(*q*) 1 Madd. Ch. 114.

(*r*) Mostyn *v.* Mostyn, 5 Hou. of Lords; Wigram on Wills, 51; Jarman on Wills, 361, 2nd ed.

(*s*) Lansdowne *v.* Lansdowne, Mos. 364; 2 Jac. & Walk. 205.

(*t*) Jones *v.* Morgan, 1 Bro. C. C. 219.

(*u*) Jarvis *v.* Duke, 1 Vern. 19; Gee *v.* Spencer, ib. 32; Broderick *v.* Broderick, 4 Vin. Ab. 534; 1 P. Wms. 239; Bowles, 1 Sch. & Lef. 209; Murray *v.* Palmer, 2 Sch. & Lef. 474; Evans *v.* Llewellyn, 2 Bro. C. C. 150; East India Company *v.* Donald, 9 Ves. 275; Clifton *v.* Cockburn, 3 My. & K. 76.

of title, arising from ignorance of a well-known principle of law such as to imply fraud or surprise (*x*). It must be observed, that the opinion of Lord Chancellor King, in Lansdowne *v.* Lansdowne, that the maxim "Ignorantia juris non excusat" does not hold in civil cases, has not been followed in modern times (*y*).

Courts of equity will, in certain instances, admit parol evidence to vary or alter a written instrument in cases of accident, mistake or fraud (*z*), although such evidence is inadmissible in a court of law.

How understood in the Civil Law.

This rule is in accordance with the doctrine of the Civil Law, which, in this instance, our lawyers have adopted. Among the Roman jurists, however, it was applied with pretty much the same caution and qualification, that an outstanding term is allowed to avail in favour of an innocent purchaser against mesne encumbrances—that is, provided the purchaser was, at the time he completed his contract, ignorant of the fact that the estate was subject to charges; but not if he had either actual or constructive knowledge of the transaction; for then he would be doing an injury to the encumbrancers with his eyes open. A purchaser (to borrow Lord Eldon's idea upon this subject) is at liberty to lay hold of an outstanding term to protect himself as with a shield, but he has no right to use it as a sword. Thus, among the Civilians, ignorance of the law does not come in to aid those persons who are seeking to appropriate the property of others, but only when they are endeavouring to secure their own; for, in the words of the Digest, "Juris ignorantia non prodest adquirere volentibus, suum verò petentibus non nocet" (*a*).

(*x*) Stor. ss. 121—125, 128—137.
(*y*) Stewart *v.* Stewart, 6 Cl. & Fin. 966.
(*z*) Murray *v.* Parker, 19 Bea. 308.
(*a*) Dig. L. 22, t. 5, s. 7; Doc. and Stu. b. ii. c. 46, 47.

CHAPTER II.

ACCOUNT.

Account;—concurrent jurisdiction exercised by courts of law and equity.

ALTHOUGH a party filing his bill in a court of equity, in cases of an account, may be entitled to his remedy at common law; yet the advantages of proceeding in equity, in almost all matters of this nature, have been so sensibly felt by a long and steady experience, that by degrees this Court has obtained a concurrent jurisdiction with those of common law. It is said that the ground upon which equity first began to assume this power was the difficulty of obtaining complete justice in the courts of common law; for, although the action of account lies at common law, yet, when the accounts are brought before the auditors of these courts, there is so much difficulty and delay in settling them (especially if they be long and intricate), that recourse is now seldom had at law for that purpose —a court of equity having the advantage, by its mode of proceeding being peculiarly adapted for the task, of investigating matters of account, as between adverse parties, and compelling the payment of whatever balance is found due to the party entitled (*a*). "The jurisdiction in matters of account," says Lord Cottenham (*b*), "is not exercised, as in many other cases, to prevent injustice which would arise from the exercise of a purely legal right or to enforce justice in cases in which courts of law cannot

Almost confined to courts of equity.

(*a*) Mitf. 120, 4th ed.

(*b*) North Eastern Railway Company *v.* Martin, 2 Phil. 762.

afford it; but the jurisdiction is concurrent with that of the courts of law, and is adopted because, in certain cases, it has better means of ascertaining the rights of persons."

In order to maintain a bill for an account, it is necessary that it should relate to that which is the subject of mutual acknowledgment (*c*).

Bills for account are frequently brought by heirs, legatees, and creditors, against executors and trustees. It is also the usual mode of obtaining relief by partners against each other, by principals against their factors and agents, and by mortgagors against mortgagees who have been in possession, and *vice versâ*.

Whenever the plaintiff succeeds in establishing that the defendant stands towards him in the relation of trustee, or quasi-trustee, his right to an account seems to follow as a necessary incident to that relation (*d*).

Difficulty of taking accounts at law.

The objection to a court of law for taking a long arithmetical account is pretty clearly laid down by Mr. Justice Taunton, in Ferguson *v.* Sprang (3 Nev. & Man. 665); which was a question of usury, where A., in consideration of £200, granted to B. an annuity or rent-charge for sixty years, charged upon certain messuages. "It is difficult," says the learned judge, "for us to say by how much this reservation of £20 a year for sixty years will exceed the principal and interest at 5 per cent. We cannot compute it. It is too difficult a question for the court to take judicial notice of. If this were a question, whether ten were more than five, or that two and two made four, the court would take judicial notice of it. Here the question depends upon a difficult calculation, and ought therefore to be inquired into by a jury." This case coming before

(*c*) Taff Vale Railway Company *v.* Nixon, 1 Cl. & Fin. 111.
(*d*) Madd. Ch. 115 (n).

CHAP. II.

the K. B. on a demurrer, L. C. Justice Denman, in reference to Fennday *v.* Wrightwick (1 Rus. & My. 45), and the power of a court of chancery in taking matters of account, said that was of no authority, as the master of the rolls might have acted there in the capacity of a court and of *a jury also;* "which," said his Honour the V.-C. of England, in Chillingworth *v.* Chillingworth (8 Sim. 413), "contains the pith of the case—namely, that the master of the rolls sat as jury as well as a judge, as I do."

A party having no right at law for account is remediless in equity.

A right to account being founded upon the same principle, whether at law or in equity, it follows that whenever a party cannot recover at law, he is generally remediless in a court of equity (*e*); but it was held by C. B. Alexander that it is not every account which will entitle the court to interfere, and that it must be such an account as cannot lie fairly and justly in a court of law (*f*).

Account between tradesman and customer.

A bill for an account may sometimes be filed between a tradesman and his customer, especially where securities have been obtained from an extravagant or inexperienced young man by means of misrepresentation (*g*); and in a MS., 14th December, 1791, in the Court of Exchequer (*h*), Lord Chief Justice Eyre expressed an opinion that dealings between a tradesman and his customer are the subject of account in a court of equity,—not, however, if their dealings have been confined to a single payment, but where there had been a series of demands on the one side, and payments on the other.

Set-off at law will not be entertained in equity.

A court of equity will not entertain a suit, if the subject be capable of proof, and a matter of *set-off* at law; because, in general, where the party may have his remedy

(*e*) 13 Ves. 278.
(*f*) Frietas *v.* Das Santos, 1 Y. & Jerv. 576.
(*g*) Lord Courtenay *v.* Godschall, 9 Ves. 473.
(*h*) Wellings *v.* Cooper.

in a court of law, equity will not interfere. Thus, where, as between *landlord* and *tenant*, the accounts are too varied and complicated to be taken at law, the tenant may file his bill for that purpose; yet, if the tenant's counter-demand amount to a legal set-off, he will have no relief in equity (*i*).

Factor and principal.

A bill for an account will also lie against a factor or his representatives on behalf of his principal, unless the factor be an infant (*j*).

Account by heir-at-law.

An heir, for the purpose of filing a bill in equity for an account, must aver upon the record that there exists an impediment to his recovering at law; and this averment must be capable of proof, as that the defendant has in his possession the title-deeds necessary to maintain his title, or alleging that there are outstanding terms which may prevent his recovering at law, or any other obstacles which may prevent it; equity then directs the heir to bring an ejectment, providing that the defendant shall not set up at law any term, whether satisfied or not (*k*). These impediments being put out of the way, a trial is had before the proper tribunal: the parties then come back to the court of equity for the account, the title-deeds, papers, etc. This process is called an *equitable ejectment*, and the bill an *equitable bill*. This method of proceeding is generally preferred to that of directing issues; the granting of which is discretionary with the court (*l*).

Joint debts; how dealt with.

A joint debt cannot be set off against a separate debt at law; but in equity, under peculiar circumstances, it may—namely, where there is a distinct series of transac-

(*i*) Townrow *v.* Benson, 3 Madd. Rep. 203.
(*j*) Smalley *v.* Smalley, 1 Eq. Abr. 6.
(*k*) Pemberton *v.* Pemberton, 13 Ves. 297; 4 Ves. 66.
(*l*) 1 Madd.

CHAP. II.

tions wherein joint credit had been given (*m*). An equitable set-off is where, by reason of the cross-demand, there can be no set-off at law (*n*).

Rents, profits of estates.

We have before observed, in respect of the right to account, that where a party cannot recover at law he is without remedy at equity. The same principle holds in like manner where an account is directed to be taken of *rents and profits* of estates; for, as upon a legal title, six years only of mesne profits are recoverable at law, so, where a trust estate is recoverable in equity, the account of rents and profits is not allowed to extend beyond six years (*o*), unless in the case of an infant, where an account will be ordered from the time the infant's title accrued; for every person entering on the estate of an infant is considered as his guardian or bailiff (*p*). An exception is also made where the plaintiff has been kept out of possession by unfair means on the defendant's part, such as misrepresentation, concealment, or fraud (*q*).

Partnership transactions.

An account of *partnership transactions* is also a matter for the jurisdiction of a court of equity; and it seems not necessary now that the bill should for that purpose pray a dissolution of partnership (*r*), although formerly held otherwise.

Unsettled state of the law as to the necessity of a dissolution of partnership whenever accounts are

It is much to be regretted, that the law upon this subject should have so fluctuated with the conflicting opinions of the several judges who have been called upon to adjudicate a point of so much importance to the commercial world; for since the decision of Harrison *v.* Ar-

(*m*) Williams *v.* Noble, 3 Mer. 618.

(*n*) Per V.-C. Leach, in White *v.* O'Brian, 1 S. & K. 551.

(*o*) Stackhouse *v.* Barnston, 10 Ves. 469.

(*p*) Dormer *v.* Fortescue, 3 Atk. 130; Bloomfield *v.* Eyre, 8 Beav. 250; 10 Jur. Dig. 98.

(*q*) Bennett *v.* Whitehead, 2 P. Wms. 645.

(*r*) Harrison *v.* Armitage, 4 Madd. Rep. 143.

sought by one partner against another.

mitage, referred to in the note, the case of Loscombe *v.* Russell (*s*) came before the court, in which a bill was filed by one partner against his co-partners, to have the accounts of the partnership taken, without praying a dissolution: to this bill the defendants, upon that ground, demurred, and his honour the vice-chancellor of England (notwithstanding the case of Harrison *v.* Armitage was cited) allowed the demurrer. Upon a subsequent occasion, however (*t*), the same learned judge declared that the court ought to interfere between co-partners, wherever the act complained of was one that tended to the destruction of the partnership property, although a dissolution of the partnership might not have been prayed. On the other hand, in the case of Knebell *v.* White (*u*), Mr. Justice Alderson held that a bill for an account of partnership transactions must pray for a dissolution of the co-partnership; and, where there is an open account, the party who seeks redress must put it in the power of the court to close finally by its decree the disputes between the parties: as soon as this is done, he is entitled to its assistance.

The lunacy of a partner, who has contracted to be actually engaged in the partnership, may perhaps warrant the dissolution of the partnership,—especially if he be pronounced incurable; and if the objects of the partnership cannot be carried out upon the terms upon which it was entered into, by reason of the conduct of certain of the partners, it will be dissolved, although one of the partners object to the dissolution (*x*): and where one partner filed his bill, on the ground of insanity, the vice-

(*s*) 4 Sim. 8.

(*t*) Miles *v.* Thomas, 9 Sim. 609; Walworth *v.* Holt, January 15, 1841, C. C. 4 My. & Cr. 619.

(*u*) 2 Yo. & Coll. 15.

(*x*) 1 Madd. Ch. 135.

CHAP. II.

chancellor decreed a dissolution, as from the date of the decree (*y*).

The master of the rolls, in a late case (*z*), observing upon the general rules of the court, first, that all persons interested in the subject-matter of the suit ought to be made parties, and, secondly, that, in order to do complete justice in every case, and not leave matters involved in the suit to be the subject of future litigation, says, that it was, at one time, supposed, under the second general rule, that the court could not, and would not, interfere with a partnership at all as between partners, unless the partnership was to be dissolved, and finally wound up, and settled; and there are many conflictory cases in the books on the subject, different judges having expressed very strong opinions upon the different views of the question. It now, however, appears very clear, that there is no such rule as that; for it has been decided that, in a continuing partnership, if a few have an interest in a particular subject adverse to all the rest, and claim the benefit of that interest for themselves, a bill may be filed against these few, by one or more, on behalf of all the rest: and in a more recent case (*a*), in which the above decision was alluded to, it was held that one partner may have an account and general relief, as against another, without praying to have the partnership dissolved, and the affairs wound up.

By the new act on partnership, 28 & 29 Vict. c. 86, relating to the responsibility of persons receiving a percentage out of the profits of the partnership in lieu of their services, it is provided that the advance of money by way of loan to a person engaged, or about to engage,

(*y*) Sander *v.* Sander, 2 Coll. 276; 10 Jur. Dig. 124.

(*z*) Richardson *v.* Hastings, 8 Jur. 208; 7 Beav. 301.

(*a*) Fairthorne *v.* Weston, 2 Law Times, 497; 8 Jur. 353; 3 Hare, 387.

in trade or any undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render himself responsible as such. No person being a widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by any such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or to be subject to any liabilities incurred by, such trader. No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by auction of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to the liabilities of, the person carrying on such business. In the event of a trader, as stated, being adjudged a bankrupt, or taking the benefit of any Insolvent Debtors Act, or entering into an arrangement to pay his creditors less than 20*s.* in the pound, or dying in insolvent circumstances, the lender of any such loan shall not be entitled to record any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill be entitled to record any such profits, until the claims of the other creditors of the trader for valuable consideration, in money or money's worth, have been satisfied. The word "person" is to include a partnership firm, a joint-stock company, and a corporation. As to persons receiving a percentage not being partners, see Chitty on Cont. p. 224, 7th ed., and the cases referred to.

Co-obligors.

Here it may not be out of place to state that, in the absence of any contract, there are certain obligations between parties standing in those peculiar relations to-

CHAP. II.

wards each other, which are enforcible in a court of equity, as being founded upon principles of natural justice. Thus, where a number of persons are liable, *in solido*, to one common debt or duty, any one of them may be called upon by the creditor to discharge the whole of the debt, or a greater amount than his actual proportion of it; for each one is liable to the creditor for the whole amount. In such a case, the debtor who pays has a right to sue the rest for contribution proportionably to the amount so paid. In the case of suretyship, the same right also exists to enforce contribution from the co-sureties, where one of them has been compelled to pay the whole demand against the principal (*b*). For the sureties have a common interest and a common burden.

Co-sureties.

The doctrine of contributions amongst co-sureties is not founded in contract, but it is the result of general justice from the equality of burden and benefits. Therefore where three or more sureties were bound by different instruments, but for the same principal and the same engagements, they are bound to contribute (*c*).

Co-defendants; right of contribution against,

The courts of law proceed upon the same principle against co-defendants, where the plaintiff may have judgment and execution against any one of them for the whole amount. The same right of contribution, however, is allowed as between such co-defendants, by means of the equitable action of *assumpsit* (*d*): but, as in equity, contribution does not arise where the obligation proceeds from the wrongful act of the parties, each one being liable for all the consequences (*e*); so, in law, if the amount reco-

(*b*) Tothill, 103, tem. Car. I.

(*c*) Per L. C. Baron Eyre, in Dering *v.* Earl of Winchelsea, 1 Cox, 318.

(*d*) Kemp *v.* Finden, 7 Jur. 65.

(*e*) Per Lord Cottenham in Attorney-General *v.* Wilson, 1 Craig & Ph. 98.

vered be by an action founded in tort, no contribution can be enforced between the parties (*f*).

The right to contribution is thus recognized, both at law and in equity, but with this distinction, that at law a surety is in every case entitled to contribution from his co-sureties in proportion to their number, without having regard to the insolvency of any one of them, which however a court of equity respects. Thus if A., B., and C. be co-sureties, and A. is called upon to discharge the debt, he is entitled to recover, at *law*, a third only from B., though C. may have become insolvent, whereas in *equity* he will be entitled to one-half (*g*).

borrowed from the Roman Civil Law.

The doctrine of contribution was evidently borrowed from the Roman law, to which it bears a striking analogy. By that law, each of the sureties was liable to the creditor for the whole amount of the debt; yet, as between themselves, only proportionably. Justinian, however, provided that the creditor should, first of all, sue the principal debtor, and recover what he could from him before he proceeded against the sureties (*h*). Any surety who had paid was entitled to a cession of the securities from the creditor, not only for the purpose of proceeding against the principal, but also against the other sureties, to compel contribution (*i*). The Romans might have early adopted their ideas of this doctrine from the provisions contained in the maritime laws of the Rhodians: where part of the goods and cargo were thrown overboard, for the purpose of saving the ship (*k*), those whose goods

(*f*) Pearson *v.* Skelton, 1 Mees. & Wels. 504.

(*g*) *Vide* Sm. Mer. Law, p. 453, 5th edit.

(*h*) Nov. L. 4, c. 1.

(*i*) Spence, Eq. Juris. 662 (n).

(*k*) "Si levandæ navis gratiâ, jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est."—D. 14. 2, ss. 1 and 2.

CHAP. II.

were preserved from the general sacrifice were, nevertheless, compelled to make a proportionable contribution to the sufferers, since it was done for the benefit of all. This gave rise to the curious question, as to whether the value of the lost merchandise was to be taken at the time of purchase in the foreign market, or the amount it would have fetched in the market at home.

Although at law the liability of the members of an ordinary partnership, in respect of the debts and engagements of the firm, is joint only, in a court of equity their liability is not only joint, but also several, except under special circumstances. Also, if several persons contract a debt, they are in equity not only jointly, but also severally, liable to pay it, unless the terms in the instrument creating the obligation impose upon them a joint responsibility only (*l*).

Account against agent, auditor, etc.

Persons standing in the characters of agent, auditor, land-steward, and manager, are liable to account with their respective employers: a bill for an account will also lie on behalf of a legatee against an executor. And if an agent or bailiff has mixed the property of his principal with his own, so as not to be capable of distinguishing between the one and the other, he loses the whole; and this also is in accordance with the doctrine of the Civil Law.

A stale demand in matters of account not encouraged in equity.

Although the Statute of Limitations be no bar to an open account, yet, if all transactions between merchant and merchant have ceased above six years, the statute will prove a bar (*m*), and the court, for the purpose of discouraging laches and neglect, will not favour the prosecution of a stale demand, and this from motives of public policy; for, notwithstanding time in itself does not operate to bar the right of a plaintiff to an account, yet,

(*l*) Lind. on Part., VI. 372, 2nd ed.
(*m*) Barber *v.* Barber, 18 Ves. 286.

where a party has slept upon his right for a long time, the very forbearance presumes either a satisfaction of the plaintiff's claim, or that he intended to abandon it (*n*).

Exception in cases of fraud.

It seems that the court will not allow a *stated* account to be unravelled, unless where *fraud* has been mixed up with it (*o*); and error will be sufficient to open an account settled by arbitrators, provided specific errors be shown: and it seems necessary that errors should be specifically alleged in the bill, to show the court a sufficient reason for its being filed.

Surcharge and falsification.

Alteration in practice.

Formerly when any one of the parties could point out an omission for which credit ought to have been given, it was called a *surcharge;* and if any wrong charge had been inserted, it was technically denominated a *falsification* (*p*). But now, by the 15 & 16 Vict. c. 86, s. 54, where any accounts are required to be taken at chambers, the court may give directions as to the manner in which they are to be taken or vouched; and by the 23rd Ord., 16th October, 1852, no states of facts, charges, or discharges, are to be brought in; and by the 29th Ord. ibid., it is ordered that when any account is to be taken, the accounting party is, unless the judge shall otherwise order, to make out his account and verify the same by affidavit.

(*n*) Sturt *v.* Mellish, 2 Atk. 610.
(*o*) Vernon *v.* Vawdrey, 2 Atk. 119.
(*p*) 1 Madd. Ch. 145.

CHAPTER III.

FRAUD.

Fraud; cognizance of, since the abolition of the Star Chamber.

SINCE the abolition of our English Inquisition—the Star Chamber (*a*)—which, in a great many instances, took cognizance of fraudulent transactions, and punished the guilty party, that most extensive province of jurisdiction, namely, of examining and relieving in all cases of fraud, has fallen principally, if not *almost exclusively*, upon a court of equity: for, as a court of common law does not possess the means of sifting the fraud, by fastening on the conscience of the fraudulent person, and purging him by oath, the offence belongs to an equitable tribunal, which is peculiarly adapted by its constitution to attain that object.

Jurisdiction of equity in cases of fraud.

Equity takes cognizance of fraud only in a *civil*, and not in a *criminal*, point of view; therefore, it cannot punish the offender, as we have seen was the case in the Court of Star Chamber, before it was put down.

The jurisdiction of a court of equity, in matters of fraud, exercises itself in two ways—1, To *prevent* fraud; 2, To *redress* fraud after it has been committed.

1. Under the former head, we may reckon those cases wherein equity has interfered, from motives of policy, to prevent the purchase of estates, by persons invested with a fiduciary character, from the parties, individuals for whose benefit they hold; which transactions, although

(*a*) 16 Car. I. c. 10.

strictly honest, and but for the relative situations of the parties not to be impeached, yet—considering the influence likely to be possessed by the person entrusted with the property, his intimate knowledge of the same, and the dangerous temptation thereby presented to him, to use such influence and knowledge for his own advantage—a court of equity watches with a jealous eye over the acts of a trustee, and will not, in such a case, allow him to become a purchaser of any part of the trust estate (*b*); for equity, relying on the truth of the maxim, "Emptor emit quam minimo potest, Venditor vendit quam maximo potest," will consider the frailty of human nature, and that a person possessing the opportunity of serving his own interests will be in danger of doing so at the expense of another; and it was said, *arguendo*, in the case of the York Buildings Company *v.* Mackensie (*c*), that the grounds on which that disqualification rests is no other than the principle which allows no person to be judge and party in the same cause.

Contracts between trustee and *cestui que trust* discountenanced by the Court of Chancery.

Lord Hardwicke, in Davidson *v.* Gardner (*d*), said it had been laid down as a general rule, that where a trustee, for persons not *sui juris*, as infants and *feme coverts*, becomes both buyer and seller, the court will in nowise, be the circumstances ever so fair between the parties, establish a purchase of that kind, unless it be legitimated by the sanction of the court, or some public act; from which exception it appears that trustees might purchase the estate of infants who are *cestuis que* trust, if the sale took place before a master (*e*). But even this exception in favour of trustees was found to be prejudicial; for, within a few years after the last decision, the same judge

(*b*) *Ex parte* Bennet, 10 Ves. 381; *Ex parte* Morgan, 12 Ves. 6.
(*c*) 8 Bro. P. C. 63.
(*d*) Chan., 21st July, 1743, MS.
(*e*) Sug., V. and P.

CHAP. III.

determined that a trustee could not even buy at a *sale by auction* (*f*); so that a purchase by a person of the trust property, whether he be a trustee for adults or infants, would have been set aside, although the estate had been sold under the direction of the court, before a master, or by public auction;* and the court would not have permitted trustees to give up their office, and bid. Where, also, a person is unable to purchase the estate himself, he cannot buy it as agent for another, and perhaps would not be allowed to employ even a third person to contract or bid for the estate on behalf of a stranger (*g*).

Trustee for sale on behalf of an infant.

If a trustee for sale of an estate on behalf of an infant be desirous of becoming the purchaser, he must file a bill to carry the trust into execution under the decree of the court, and then upon the sale, apply for leave to purchase, by offering to give more than any other person (*f*).

The solicitor of a trustee will not be allowed to purchase the trust estate (*h*).

Executors and trustees for sale.

It was formerly held that, where lands were devised to executors to be sold, an acting executor could not sell to a renouncing executor; because he was privy and party

(*f*) Whelpdale *v.* Cookson, Reg. Lib. B. 1748, fol. 552; cited in Campbell and Walker, 5 Ves. jun. 682.

* The stringency of this rule however has been relaxed in modern practice; whether for better or worse it is hard to determine.

(*g*) Sug., V. and P., *Ex parte* Bennet, 10 Ves. 381. *Sed quære.* This case was under a bankruptcy, where the rule against purchasers of trust property by the trustee applies with more force to assignees in bankruptcy. *Vide* Stor. ss. 321, 322; Smedley *v.* Varley, 23 Bea. 358; Denton *v.* Donner, id. 285. There cannot however be any objection to a purchase by a person named as a trustee, but who has disclaimed, without having ever acted in the trust.—Lewin on Trusts, 363.

(*h*) Downes *v.* Grazebrook, 3 Meriv. 200.

to the last will, and remains executor still (*k*). But this doctrine has been overruled at law (*l*); and in equity it would depend on its own peculiar circumstances. The court would most probably see fit to set it aside, if the sale were prejudicial to the *cestui que* trust.

It was formerly held that executors did not disqualify themselves from executing a power of sale over a real estate from the circumstance of their having renounced probate of the will as to personal estate, although in the case of Keates *v.* Burton (*m*), where a testator had given a discretionary power to his trustees and executors over the application of the interest of a money fund and one of the executors died and the others renounced, Sir William Grant said that the executors had not exercised the power, and had renounced the only character in which it was competent for them to exercise it (*n*).

Reasons why neither an auctioneer nor a mortgagee can purchase.

With respect to an *auctioneer*, it is said that Lord Eldon has expressed himself strongly against the validity of a purchase made by him of the property he is employed to sell; and, perhaps, upon the principles which govern the case of trustees, the better opinion is that such a sale would be set aside. It is the same principle which guides the court in the case of a trustee and *cestui que* trust, in respect of the trust fund, that a mortgagee shall get no advantage out of the mortgage fund, beyond principal and interest (*o*), and which induces the court

(*k*) Co. Litt. 113 (a).

(*l*) Denne *d.* Bowyer *v.* Judge, 11 East, 288; Mackintosh *v.* Barber, 1 Bin. 50.

(*m*) 14 Ves. 434—437.

(*n*) See now the 20 & 21 Vict. c. 77, s. 79, and 21 & 22 Vict. c. 95, s. 16.

(*o*) Gubbins *v.* Creed, 2 Sch. & Lef. 248; Webb *v.* Rorke, ibid. 661.

sometimes to set aside a sale between a mortgagor and mortgagee of the equity of redemption (*p*). But it should be observed, with reference to mortgages, the court, in taking accounts between mortgagor and mortgagee, will, for the sake of doing justice to all parties who claim its protection, direct annual rests. Annual rests are, in conveyancing, somewhat similar to the much-talked-of sinking fund in fiscal language: it is where a mortgagee has entered into the annual receipt of the rents of the mortgaged property, and after paying himself thereout the yearly interest of the mortgaged money, finds himself in the possession of a surplus; this being from year to year applied to the reduction of the principal, is denominated annual rests, which are subject to various regulations.

Annual rests.

It appears that annual rests will not be directed where there was an arrear of interest due at the time the mortgagee entered into possession and receipt of the rents; even after such an arrear of interest has been paid off, and though it should happen that the amount of rents far exceeds the yearly interest of the mortgage money (*q*).

Rules observed in respect to annual rests.

But, notwithstanding there was an arrear of interest when the mortgagee entered into possession, yet, if he has received a portion of rents and profits sufficient to pay off his principal and interest, rests will be directed to be taken against him from the period of such discharge, with interest from time to time upon the balance in hand; the mortgagee now being considered in the character of trustee for the mortgagor, in respect of the rents to the mortgaged estate, after the principal and interest are paid off (*r*).

(*p*) Webb *v.* Rorke, 2 Sch. & Lef. 673.

(*q*) Davis *v.* May, Corp. 238; 19 Ves. 383; Latter *v.* Dashwood, 6 Sim. 462; Finch *v.* Brown, 3 Beav. 70; 4 Beav. 214.

(*r*) Quennell *v.* Beckford, 1 Madd. 269; Wilson *v.* Metcalf, 1 Russ. 530.

Also, when, by an agreement between mortgagor and mortgagee, the latter consents to join the arrears of interest to the principal, so that by the time he enters into possession the whole is consolidated into one fund, and considered as principal; if the mortgagee continue in possession after the statement of the account, and there appear no interest due to him, he will be dealt with from that time as a mortgagee who takes possession without any interest being in arrear, and will be charged with rests for the purpose of reducing the principal (*s*).

The court will direct annual rests when there is no arrear of interest at the time the mortgagee takes possession, unless the surplus of the annual rents and profits be very small (*t*).

Cases in which a solicitor or attorney may purchase of his client.

Although a court of equity watches over the conduct of solicitors and attorneys, whilst managing the business of their clients, with the same jealous policy, so far as not allowing them to purchase the property while it continues to be the object of litigation, yet, when the relationship between them is at an end, and all apprehensions as to improper influence thereby cease to exist, a client may, from motives of generosity, make over part of the property by a voluntary conveyance to his solicitor, as well as to any other person (*u*).

Precaution necessary to be observed in so doing.

In a transaction of this kind, however, the solicitor ought to take the precaution of severing the connection between himself and his client, and putting him (as it

(*s*) Wilson *v.* Cluer, 3 Beav. 138.

(*t*) Shephard *v.* Elliott, 4 Madd. 254; Donovan *v.* Fricker, Jac. 168.

(*u*) Wells *v.* Middleton, 1 Cox, 112; Wright *v.* Proud, 13 Ves. 138; Moss *v.* Bainbridgge, 18 Beav. 478; 6 De G., M. & G. 292; Tomson *v.* Judge, 3 Drew. 306—*Sed vide* Nanney *v.* Williams, 22 Beav. 452.

CHAP. III.

has been expressed) at arm's length, by calling in the aid of a third person, to act as agent for both parties; for, if this point of delicacy be not observed, equity will not be very punctilious, should inquiry arise, and the matter be brought before the court for the purpose of being examined into, in setting aside the contract: in such an event the task of proving that everything connected with the transaction was fair will be thrown upon the attorney; it will, at all events, give the party costs (*x*). An attorney will not be allowed to purchase anything in litigation, of which litigation he has had the management (*y*).

Duty of solicitor or attorney to prove the *bona fides* of such a transaction.

In a late case (*z*), it was observed by Sir James Wigram, that there is no positive incapacity in a solicitor to purchase from his client, as in the case of a trustee and *cestui que* trust; but the rule which the court imposes is, that, inasmuch as the parties do stand in a relation which gives, or which may give, the one an advantage over the other, the onus lies on the solicitor to prove that the transaction is fair.

Also, in a more recent case, before the master of the rolls (*a*), the defendant, a solicitor, was also a trustee of property under a will, for the plaintiffs. The defendant had been engaged in certain law proceedings, in behalf of the plaintiffs, in reference to the sale of the trust estate, and had delivered to them a bill of costs, and a draft of a release to himself as trustee, duly accounting for the

(*x*) Gibson *v.* Jeyes, 6 Ves. 277; Huguenin *v.* Baseley, 14 Ves. 300; *vide* Hunter *v.* Atkins, P. Coop. 464; New *v.* Jones, 9 Jarm. Prec. 731, 3rd edit.; Holman *v.* Loynes, 4 De G., M. & G. 270; Waters *v.* Thorn, 22 Beav. 457; Savery *v.* King, 5 Ho. of Lds. 627—655; Cowdry *v.* Day, 1 Giff. 316; Gresley *v.* Mousley, Id. 450.

(*y*) 1 Madd. Ch. 161; Hall *v.* Hallal, 1 Cox, 134.

(*z*) Edwards *v.* Meyrick, 6 Jur. 924; Thomas *v.* Philipps, 8 Law Times, 272; 11 Jur. 80.

(*a*) Stanes *v.* Parker, 10 Jur. 603.

trust property after deducting the amount of his bill. This draft was detained by the plaintiffs for a fortnight, who then executed the deed. They afterwards filed their bill to set aside the release, and to have their shares of the testator's estate paid over to them, without allowing the defendant anything for his professional services in respect to the trust. There was no objection raised as to the charges, but that the defendant, who was a trustee, had no right, upon the general principle, to charge for services done as solicitor to the trust. The master of the rolls, however, allowed the release to stand, upon the ground that the parties, having the draft release by them for so long a time, must be presumed to have executed it with a full knowledge of its intent and operation; and his lordship therefore dismissed the bill with costs.

General rules necessary to be regarded where persons stand in situations of confidence.

It is generally understood that, whenever the relationship of employer and agent is found existing in situations where, of necessity, much confidence must be placed by the employer in the agent, the court will exercise its watchfulness, lest that confidence should be abused; therefore, the same principle upon which courts of equity relieve against securities taken by an attorney from his client will apply to an agreement taken by a medical adviser from an aged patient, by which the former, in consideration of his past and future services, was to be paid £25,000 after the death of the latter: and it was the opinion of the vice-chancellor of England that such a transaction was void at *law*, for it held out a direct premium to the medical adviser to accelerate that death upon the happening of which he was to have £25,000. "I ought," said his Honour, "at once to set my face against a transaction which is fraught with all the mischief that this court can ever set itself to prevent in the case of solicitor and client; and if a case were to arise before me (although there be no positive decision upon the subject) where I

should find that a clergyman, or any person in the habit of imparting religious instruction, had taken from a person who placed confidence in him a security similar to that in the present case, I should not require to have quoted to me an exact precedent, but I should be guided by the principle on which the court acts in cases between client and solicitor" (*b*).

Such a case, however, as the one alluded to by the vice-chancellor, did shortly afterwards occur: it was where a Roman Catholic clergyman acted as spiritual adviser to the testator, and, taking advantage of that situation, became the agent and manager of the testator's temporal affairs, and, while holding those opposite characters, became also donee of very large gifts under the testator's will. The court considered that these were very strong grounds made out for inquiring as to undue influence, without determining what the result of the investigation might be (*c*).

Also where a person had acquired great influence over the mind of a lady of weak intellect, to whom he stood as spiritual adviser, and had induced her to assign over to

(*b*) Dent *v.* Bennett, 7 Sim. 546.—The judgment in this case was confirmed by Lord Cottenham upon appeal (4 My. & C. 269); wherein his Lordship, in referring to the vice-chancellor's opinion as to the illegality of the agreement in point of law, said he should abstain from stating anything upon that subject, but put it simply upon the doctrine laid down by Lord Eldon in Gibson *v.* Jeyes (6 Ves. 266),—"that those who meddle with such transactions take upon themselves the whole proof that the thing is righteous;" but that, in the case before him, so far from the defendant having succeeded in so doing, the evidence proved the reverse.

The same principle holds equally good where parties stand towards each other in the relative position of tutor and pupil, notwithstanding the latter be upwards of twenty-one years of age.—Peacock *v.* Kernot, 1 Verulam, Real Prop. Rep. 199.

(*c*) Middleton *v.* Sherburne, 4 You. & Coll., Eq. Ex. Ca. 378.

him the whole of her fortune, by persuading her and others that he sustained a supernatural character, the court set aside the gift in favour of her next of kin (*d*).

Influence of guardian over his ward jealously watched by the court, after the legal relationship of guardian and ward has ceased.

The same motives of public policy, which induce the court to throw its protection around the interest of the *cestui que* trust, especially if he be an infant, operate also in the case of *guardian* and *ward*, and will allow no transaction between them, tending to a suspicion of undue influence, which the guardian might exercise for his own benefit over his ward, immediately upon his coming of age (*e*), and at the time of settling the account. And, after the relationship between guardian and ward has legally ceased, the court will interfere to protect the ward from acts done by him on behalf of the guardian, where, from circumstances, the moral influence may be reasonably presumed to have continued. This will be seen in Archer *v.* Hudson, heard before the lord chancellor upon appeal in March, 1846 (*f*), and in Maitland *v.* Irving (*g*), wherein the circumstances involved were so like in principle as, at first sight, to appear to be one and the same case. A perusal of these two cases will abundantly repay the diligent student.

Archer *v.* Hudson.

Nevertheless, when the ward has arrived at full age, and has entered into possession of his estate, and the relationship no longer exists, and all undue influence can be fairly presumed to be removed, there is no objection

(*d*) Nottidge *v.* Prince, 2 Giff. 264; 6 Jur., N. S. 1066; 29 Law Journ., Chan. 857.

(*e*) 1 Ball & Bea. 230.

(*f*) 7 Bea. 551; *S.C.* on appeal, 15 Law Journ., N. S., Chan. 211; 7 L. T. 105.

(*g*) 10 Jur. 1025; 8 L. T. 312; 15 Sim. 437; Grosvenor *v.* Sherratt, 28 Beav. 659.

CHAP. III.

to his making the guardian some pecuniary acknowledgment for past care, attention, and services (*h*).

Expectant heirs protected by the court.

Expectant heirs are equally protected by equity against all the world, in dealing with their expectancies, as are *cestui que* trusts against the purchase of their estate by trustees; and, if a suit be commenced, it will lie on the purchaser to show that the transaction was a fair and *bonâ fide* one (*i*).

Inadequacy of consideration.

The court will, also, in favour of young heirs, set aside the sale of an expectancy, on the ground of inadequacy of consideration (*k*). The inadequacy of the consideration is considered with reference to the time of the contract, and not to the event itself; and the burden of proof in such cases is thrown upon the *purchaser*, to show that a full and sufficient consideration was paid (*l*). And it seems that equity will not, where the terms of the contract appear to be unconscionable, take into consideration the risk which the vendee runs from the uncertainty or remoteness of the interest, and the danger he incurs of losing his money should the heir-expectant die before he comes into possession of the estate: nor will the fact of the heir being unprovided for avail much in the purchaser's favour (*m*).

Reasons for discountenancing the

The principal motives which lead the court to discourage the sales of reversions by heirs are—1, That it opens

(*h*) Dawson *v.* Massey, 1 Ball & Bea. 219; Wright *v.* Proud, 13 Ves. 138.

(*i*) Coles *v.* Trecothick, 9 Ves. 246.

(*k*) Twistleton *v.* Griffith, 1 P. Wms. 310; Gowland *v.* D. Farie, 7 Ves. 20. *Vide* Lord Aldborough *v.* Tyre, 7 Cl. & Fin. 457; and the observations of Lord Cottenham in that case.

(*l*) Sug. V. & P. ed. 14, p. 276; Bromley *v.* Smith, and Boustead *v.* Bromley, 26 Beav. 644; 29 Law Journ., Chan. 18.

(*m*) Bromley *v.* Smith, 26 Beav. 644.

sale of reversionary interests;

a door to take an undue advantage of an heir in distressed and needy circumstances; 2, That, if there were no controlling power, a young heir might be induced to shake off his father's authority, and feed his extravagances by disposing of the family estate. The former may be considered as a private reason: the latter is founded on public policy (*n*). These considerations, however, do not apply where the father, tenant for life, and his son, tenant in tail in remainder, concur in the sale; for the two, having in them but one inheritance, and forming but one vendor, having a present interest, meet the purchaser with the same advantage as if a single person had in himself the power over the whole estate (*o*).

But where an estate is held in trust for the life of the father, with remainder to his son in fee, and immediately upon the son's coming of age the father and son sell the estate, and the whole of the purchase-money is paid to the father, and the purchaser applies to the court to complete the transaction, its *bona fides* must be proved (*p*).

The same rules in great measure formerly applied also to any sale of a reversionary interest: but now by a recent statute "no purchase, made *bonâ fide* and without fraud or unfair dealing, shall hereafter be set aside or opened merely on the ground of undervalue" (*q*).

It may be laid down as an indisputable proposition that in any age or country, wherever extravagant and dissipated young gentlemen are to be found, there will be no lack of commercial harpies, ever ready to supply their demands by a timely accommodation in the way of loan, at the usual rate of ruinous interest. This seems to have

(*n*) Earl of Chesterfield *v.* Janssen, 2 Ves. 125.

(*o*) Wood *v.* Abrey, 3 Madd. 422; Wardle *v.* Carter, 7 Sim. 490.

(*p*) Hannah *v.* Hodgson, 30 Beav. 19.

(*q*) 31 & 32 Vict. c. 4, s. 1. See Sug. V. & P. ed. 14, p. 277, *et seq.* as to old law.

CHAP. III.

Lord Bacon's observation upon the subject.

been particularly felt in the days of Lord Bacon, and to have induced an impression on his mind as to the necessity of a Parliamentary interference to check the vicious system adopted to evade the laws of usury; for after the death of that great man, there was found among his manuscripts a paper writing, which he had sketched out, intituled "Draught of an Act against an usurious shift of gain in delivery of commodities instead of money." Its preamble is somewhat curious, as unfolding the system of roguery and fraud which was had recourse to by money-lenders in those days; showing that the modern race of usurers have but little improved upon their progenitors either in conscience or morality:—"Whereas, it is a usual practice to the undoing and overthrowing many young gentlemen and others, that, when men are in necessitie and desire to borrow money, they are answered that money cannot be had, but that they may have commodities sold unto them upon credit, whereof they may make money as they can; in which course it ever comes to pass, not only that such commodities are bought at extreme high rates and sold again far under foot to a double loss, but also that the party which is to borrow is wrapped in bonds and counter-bonds: so that upon a little money which he receiveth, he is subject to penalties and suits of great value: Be it therefore enacted, by the authority of this Parliament, etc. . . . . And that all bonds and assurances whatever made for that purpose, directly or indirectly, shall be utterly void" (*r*).

To what extent the court operates upon a usurious bargain.

When the assistance of the court is necessary to set aside a usurious contract, it will yield its aid only so far as that justice may be done to both parties; and this is effected, not by causing the defendant to lose his principal as well as interest, but, following the maxim of equity,

(*r*) Law Tracts, 278.

that he who asks for justice must do justice, will impose upon the plaintiff the terms of paying what is fairly due, with legal interest (*s*).

Injunctions.

Under the branch of the equitable jurisdiction *for the prevention of fraud* are classed *injunctions;* which are *prohibitory writs* granted at the discretion of the court, according to the nature of the case, against one or more parties to the suit. It must be specially prayed for by the bill in which the plaintiff's title is set forth, and cannot be included in the prayer for general relief (*t*).

Until lately the granting an injunction belonged exclusively to the Court of Chancery; but by several Acts of Parliament hereinafter mentioned, a concurrent jurisdiction is given to the courts of common law in certain cases for granting injunctions. Thus by the 15 & 16 Vict. c. 83, s. 42, it is enacted, that in any action in any of the superior courts at Westminster for the infringement of letters-patent, the court in which such action is pending, or a judge thereof, may make such order for an injunction, inspection, or account as to such judge or court may seem fit. By the 17 & 18 Vict. c. 31, s. 3, "The Railway and Canal Traffic Act," a provision is made for any person complaining against any company for anything done in contravention of the Act to apply to the Court of Common Pleas to hear the matter of complaint and to issue a writ of injunction, or such violation or contravention of the Act, and enjoining obedience to the same. By the Common Law Procedure Act, 1854, s. 82, in all cases of breaches of contract where the plaintiff has commenced his action, he may apply *ex parte* to the court or a judge for a writ of injunction to restrain the de-

For what purpose granted.

(*s*) Scott *v.* Nesbit, 2 Bro. 641; S. C., 2 Cox, 183.
(*t*) Burdett *v.* Hay, 12 W. R. 61; Amb. 70; 1 Ves. & B. 314.

fendant from the repetition or continuance of the wrongful act or breach of contract, and in every case of disobedience, such writ may be enforced by attachment by the court, or, when the court shall not be sitting, by a judge.

The jurisdiction of the Court of Chancery is not taken away by the Common Law Procedure Act, 17 & 18 Vict. c. 125 (*u*). And a defendant at law having an equitable defence is not compellable to plead it at law (*x*), but may still resort to a court of equity to restrain the plaintiff at law from proceeding in his action (*y*).

The most usual purposes for granting injunctions are the following:—1, To stay proceedings in other courts of judicature; 2, To stay waste; 3, To restrain the infringement of patents; 4, To prevent the sale of books, printed music, or prints; 5, To restrain the negotiation of bills of exchange or other securities; 6, To prevent the committing of nuisances.

The court will not grant an injunction where the title to relief in equity depends upon a legal right, except only in those cases where it appears that in that way the rights of all parties may be best protected (*z*).

It is necessary, in almost all cases, for the purpose of obtaining a writ of injunction, that the bill should be filed; since without the institution of a suit and prayer of process, there is nothing whereon to ground the in-

(*u*) Att.-Gen. *v.* Great Northern Railway Company, 6 Jur., N. S. 1006.

(*x*) Terrell *v.* Higgs, 1 De Gex & J. 388; Farebrother *v.* Welchman, 3 Drew. 122. Also 15 & 16 Vict. c. 76, ss. 211, 226. *Vide* also 17 & 18 Vict. c. 125, ss. 79, 81, 82.

(*y*) Kingsford *v.* Swinford, 5 Jur., N. S. 261; Waterlow *v.* Bacon, 2 L. R., Eq. 514.

(*z*) Rigby *v.* Great Western Railway Company, 10 Jur. 531; Waterlow *v.* Bacon, 2 L. R., Eq. 514.

junction (*a*): there are, however, exceptions to the general rule (*b*).

The court never grants an injunction unless for the sake of preventing immediate injury at the time, and there must also then be proof of its necessity; but in no case of future possible injury does it interfere (*c*).

Where the bill seeks to obtain a discovery and to stay proceedings in another court, a motion for an injunction cannot be made until after filing the interrogatories (*d*), provided at least the defendant has appeared and so could be served with interrogatories (*d*).

Injunction to stay proceedings at law.

Formerly, whenever the bill for an injunction prayed that proceedings at law might be stayed,* the injunction was granted, of course, without a notice and without an affidavit of merits (unless the defendant were abroad), immediately (*e*), *for want of appearance or answer;* or, if the answer was filed, upon the matter therein confessed; and sometimes upon the special circumstances of the case. But the plaintiff could not on an application by motion contradict the answer by affidavit, but must take the answer as it stood. If the defendant happen to be in contempt for not having appeared, the plaintiff's solicitor, on affidavit of service of subpœna, might on motion or petition, have moved, as of course, for the injunction. But now, the 45th Order, 7th August, 1852, and 25

(*a*) Savory *v.* Dyer, Amb. 70.

(*b*) Wright *v.* Atkins, 1 Ves. & B. 313; Casmajor *v.* Strode, 1 Sim. & S. 381.

(*c*) Maxwell *v.* Ditchburn, 5 Law Times, 405.

(*d*) Fuller *v.* Ingram, 5 Jur., N. S. 510; Chilton *v.* Campbell, 20 Beav. 531; Fitzgerald *v.* Butts, 9 Ha. App. lxv.

* Before the 15 & 16 Vict. c. 86, an injunction to stay process at law was called emphatically the *common* injunction. All the rest were known as *special* injunctions. See s. 58 of the Act.

(*e*) 2 Meriv. 474.

CHAP. III.

Cons. Or., founded on the 58th section of the 15 & 16 Vict. c. 86, for the reasons hereinafter stated, direct that no injunction for stay of proceedings at law is to be granted, as of course, for want of appearance or answer to the bill.

After answer the injunction will either be dissolved or continued, according to the merits.

Upon the coming in of the defendant's answer within the time prescribed, and he not being in contempt, the plaintiff's right to the injunction formerly depended upon the merits disclosed in the defendant's answer. In this case the plaintiff must serve the defendant's solicitor with a *special* notice of motion for the injunction, and the plaintiff's right to the injunction is argued in court upon the coming on of the motion. Where there are two or three defendants to a bill for injunction, against whom it has been obtained, the injunction will not be dissolved till all have answered (*f*). Sometimes, even under the former practice, in very pressing cases, the court would allow a *special* injunction to restrain proceedings *at law*, although the defendant was neither in default for want of appearance nor for not filing his answer—as where a judgment has been entered up upon a warrant of attorney—so that, with all due diligence, the party could not have obtained the common injunction in time (*g*).

If it be wished to stay the trial of the action at law as well as execution, it must be done by a separate motion, as an injunction to stay execution and trial cannot be granted on one motion (*h*). The motion must be supported by affidavit, stating that the plaintiff cannot with safety proceed to trial of the action until the defendant's answer be put in; and that he verily believes the answer will produce a discovery material to the just trial of the action: and the affidavit must be made by the plaintiff,

(*f*) Barn. 354.
(*g*) Annersley *v.* Rocke, cit. in Franklyn *v.* Thomas, 3 Meriv. 266.
(*h*) Wright *v.* Braine, 3 Bro. C. C. 87.

unless a sufficient reason appear why he does not make it (*i*).

Effect of the injunction, in reference to the state of the action at law.

The effect of the injunction to restrain proceedings at law is,—that, if upon service thereof the defendant in equity has not commenced his action at law, he cannot sue out process;—if he have done so, and not yet delivered or filed his declaration, it restrains all further proceeding. But, if there have been any declaration filed or delivered, it only restrains execution; and all mesne proceedings may be had by such defendant in Chancery, as demanding a plea; and, for want of such plea, signing judgment: or the cause being at issue, he may go to trial, obtain a verdict, and thence proceed to judgment (*k*). If judgment be executed, and the debt and costs levied thereon, the sheriff cannot pay the money over to the defendant, but he may be ordered to pay the money into court.

Why equity interposes to restrain actions at law.

The grounds upon which equity has interposed to restrain actions in courts of ordinary jurisdiction are,—that a party by fraud or accident may frequently have an advantage in proceeding in these courts, which must necessarily make them instruments of injustice; and it is against conscience that he should use that advantge to the prejudice of another (*l*). Therefore, when the Court of Chancery interferes to restrain proceedings at law, it is not out of any assumption of supremacy over the ordinary tribunals, but in respect of its jurisdiction as a court of equity, whereby it controls the *party* and not the *court*, from proceeding at law. Equity, in these cases, without denying the jurisdiction of the common-law courts, proceeds upon this principle, namely, that the party is

Agit in personam.

(*i*) Spalding *v.* Keely, 7 Sim. 377.

(*k*) Bishton *v.* Birch, 2 Ves. & Bea. 41; Earnshaw *v.* Thornhill, 18 Ves. 488.

(*l*) Mitf. Tr. Pl.; 1 Madd. Ch. 182.

making use of that jurisdiction contrary to equity and conscience; and in this respect the injunction differs from a *mandamus* and a *prohibition*, the latter being directed to a court or a public officer, and not to a private individual.

Advantages and disadvantages of the injunction to restrain proceedings at law.

Perhaps no principle inherent in the Court of Chancery is exercised for a more beneficial purpose than when the extraordinary jurisdiction of that court is invoked to restrain a vexatious action at common law; in which case, as before remarked, the Court of Chancery does not assume so much the right to interfere with the process of another tribunal, as it does with the person making an unconscientious and oppressive use of its jurisdiction; and, whenever such an instance really does occur, the interference of the Court of Chancery is productive of a most salutary result: but, like all other provisions of a remedial character, this equitable restraint until lately became liable to the most glaring abuse; for, as we have seen, the common injunction was had upon default of appearance or answer, and as the bill was not put in upon oath, great hardship was frequently inflicted upon the plaintiff in the course of his action; for the statements in the bill not having been inserted under the penalty of an oath were made to contain a long list of imaginary or fictitious grievances, utterly inconsistent with the truth, in order to give colour for the interference of the Court of Chancery. Indeed, Lord Cottenham, C., in a recent case, seems to have been fully sensible of the hardship, and thought that, where there existed any doubt respecting the validity of the legal right, the court ought to be extremely guarded in exercising its power of interfering by injunction. "There are two reasons," said his Lordship, "why this power of the Court ought not to be lightly put into motion: the first is, that if it turn out that the applicant's legal title should fail, the court would have interfered

without any necessity; and the second, and principal reason, is, that there is no comparison in the mischief that might result with the granting and withholding the injunction. The measure of injury which the plaintiff might sustain for the non-interference of the court could not be equal to that which the defendant might suffer from the granting of an injunction which could not afterwards be sustained; the more so, as in the one case the damage done might be ascertained and recovered, but not so in the other" (*m*). The chancery commissioners being pressed with a consciousness of the mischievous results of such a practice, recommended for remedy the provision in the 58th section of the 15 & 16 Vict. c. 86, which enacts that the practice of the Court of Chancery with respect to injunctions for the stay of proceedings at law shall, so far as the nature of the case will admit, be assimilated to the practice of such court with respect to special injunctions generally, and such injunctions may be granted upon interlocutory applications supported by affidavit in like manner as other special injunctions are granted by the court.

The change in the practice of what was formerly known as the common injunction does not operate merely for the benefit of the defendant in equity, but it is also advantageous for the plaintiff, since it enables him to get the injunction immediately on filing the bill instead of waiting, as formerly, eight days (the time limited for defendant's appearance) to obtain it (*n*); and if he applies after answer he can read affidavits in opposition to the answer, which is considered as an affidavit (*o*).

Every application therefore for an injunction to stay proceedings at law, except in an interpleader suit, is

(*m*) Electric Telegraph Company *v.* Nott, 8 Law Times, 530.
(*n*) Harris *v.* Collett, 26 Beav. 225, n.
(*o*) 15 & 16 Vict. c. 86, ss. 58, 59.

supported by an affidavit verifying the material statements of the bill; so far only, however, as they may not be admitted by the answer, if any, and if the application be made *ex parte* there must be an affidavit of merits (*p*), but not if made on notice (*q*); so that where the plaintiff had forgotten a material fact when he made an application for the injunction, and so stated on his oath in answer to a motion to dissolve, his defect of memory was held to be no excuse, otherwise the same excuse might prevail in every case, and the court expects that no material fact should be suppressed (*r*).

Since the common and special injunctions became assimilated by each requiring an affidavit to accompany the application to the court, they have lost those distinctive names by which they were originally known. At present, therefore, injunctions are considered as either *provisional* or *perpetual*—the former, as its title imports, is such as continues until a certain fixed period—the latter, or perpetual injunction, is where a party is for ever enjoined from the prosecution of an act or the assertion of a right which is contrary to equity and good faith; these form part of the decree upon the merits.

As soon as the bill is filed, the plaintiff in equity, by means of a strong affidavit of oppression and irremediable mischief (unless the court should interfere to prevent it), may obtain an *ex parte* injunction against the defendant (the plaintiff in the action at law), to dissolve which the defendant must appear to the bill and file his answer, containing such a case as will give him a chance of moving on the coming in of the answer successfully to dissolve the injunction.

The court will not grant an injunction restraining a

(*p*) Mollett *v.* Exequist, 25 Beav. 609.
(*q*) Sergison *v.* Beavan, 16 Jur. 1111.
(*r*) Clifton *v.* Robinson, 16 Beav. 355.

creditor from suing for his debt at law, unless there exists a decree for the administration of the estate of the deceased debtor under which he has a present right to come in and prove his debt (*s*). And even where a decree has been obtained in an administration suit, an injunction will not be granted to restrain a creditor from pursuing his legal remedy without an affidavit from the executor as to the amount of assets in his hands (*t*). But when the executor has so admitted assets in his answer, the injunction will be granted upon the terms of the executor paying the money into court upon motion (*u*).

The jurisdiction which now belongs to the courts of common law under the Common Law Procedure Act, 1854, ss. 50, 57, and 83, to compel discovery upon oath of the litigants and to admit equitable defences, does not interfere with the power of the Court of Equity to restrain actions at law upon the grounds on which it formerly proceeded in such cases (*x*).

Special injunctions, when granted.

Injunctions, which were formerly called special injunctions to distinguish them from common injunctions to restrain actions at law, are granted in cases where an extensive injury is about to be inflicted upon the *property* of another.

When the grievance sought to be prevented by injunc-

(*s*) Ranken *v.* Harwood, 5 Hare, 215; 2 Ph. 22; Lee *v.* Park, 1 Kee. 714.

(*t*) Cleverly *v.* Cleverly, 8 Ves. 521; Dan. Ch. Pr. vol. 2, 1465, 4th edit.

(*u*) Gilpin *v.* Lady Southampton, 18 Ves. 469.

(*x*) British Empire Ship Company *v.* Soames, 26 L. J., Ch. 259; 3 K. & J. 433; Magnay *v.* Mines Roy. Co., 24 L. J., Ch. 413; 3 Drew. 130; Hodgson *v.* Druce, 4 W. R. 576; Gompertz *v.* Pooley, 4 Drew. 448; 7 W. R. 275; Kingsford *v.* Swinford, 7 W. R. 215; Terrell *v.* Higgs, 1 De G. & J. 388—390; Waterlow *v.* Bacon, L. R., 2 Eq. 514.

tion is of so urgent and pressing a nature, that irreparable mischief would ensue if the plaintiff were bound to wait until the defendant's answer is put in, as where the plaintiff seeks to stay waste, or other cases of an analogous nature, the injunction may be applied for upon certificate of the bill being filed, accompanied by an affidavit verifying the statements contained in the bill, before appearance, or without notice of motion (*y*); provided the plaintiff make an early application to the court after the injury has happened. If, however, the defendant has appeared, a notice of motion is in general necessary (*z*); but in special cases, in the nature of waste, the court will sometimes, upon an *ex parte* application, even after appearance, allow an injunction, although, in such instances, the appearance must be stated (*a*). Where, however, the grievance is less urgent, the court will grant an injunction before answer, but will require notice of motion to be served on the defendant. The affidavit above mentioned is usually made by one of the plaintiffs, but may be sworn to by any person acquainted with the facts. It must not however be sworn until the bill has been filed (*b*).

It appears not to be the practice now so much as formerly to allow an injunction on an application *ex parte*, but to grant what is denominated an *interim* order, restraining the defendant until after a particular day stated in the order—liberty being given to the plaintiff to serve notice for an injunction for the day before such day. The plaintiff is also required to give an undertaking to submit to such terms as may be imposed upon him by the order

(*y*) Amb. 66.

(*z*) Perry *v.* Weller, 3 Russ. 519.

(*a*) 3 Meriv. 1; Petley *v.* Eastern Counties Railway Company, 8 Sim. 483.

(*b*) Ayck. Ch. Pr. 220.

of the court, as to any damages the defendant may sustain by reason of the interim order; this undertaking is, if in court, given by counsel—but where the order is granted in vacation, without the attendance of counsel, the undertaking is inserted in the registrar's book and signed by the plaintiff or his solicitor (*c*).

To avoid any delay which might otherwise happen by the new practice of printing bills under the 15 & 16 Vict. c. 86, s. 1, it is provided by section 6, that the clerk of the records and writs may receive and file a written copy of any bill of complaint praying a writ of injunction.

An injunction obtained upon an interlocutory application is superseded by the decree made at the hearing of the cause, and so it must be expressly continued by the decree if the plaintiff requires that it should remain in force (*d*).

An interlocutory injunction may be dissolved at any time before the hearing of the cause by motion, of which notice must be given for one of the days appointed to hear motions; but if it be important that the motion should be made before such a day, an application should be made to the court, before service of the notice of motion, for leave to give the notice of motion for a particular day, —the fact of such permission is required to be stated in the notice of motion (*e*).

The abatement of the suit does not necessarily operate to dissolve the interlocutory injunction, but if the defendant seeks to get rid of the injunction he must move upon notice that the plaintiff or the parties representing his interests may revive within a given time, or that the injunction may be dissolved (*f*).

(*c*) Dan. Ch. Pr. 1508; Sidney Sm. C. P. 7th edit. 822.
(*d*) Dan. Ch. Pr. 1518.
(*e*) Ibid. 1515.
(*f*) Ibid. 1517.

CHAP. III.

But where the question on an interlocutory motion for an injunction is the only or main issue in the suit, it being so raised, any order made thereon is not final; and therefore to remedy this inconvenience and to avoid the necessity of having a cause already so virtually decided again brought on for hearing, it not unfrequently happens that the parties on both sides at, or without, the instance of the court arrange to turn the application for an injunction into a motion for a decree (*g*).

The court deals with greater strictness and severity with persons applying for *ex parte* injunctions than when obtained on notice, for a very obvious reason. The injunction in the former case being applied for in the absence of those against whom it is sought, might put them unjustly to a very serious inconvenience, and therefore the party applying is bound to put the court in possession of all the facts to enable it to judge whether the defendant ought or ought not to be placed in that position. But when it is obtained upon notice, the opposite party has an opportunity of bringing forward every circumstance favourable to his case (*h*).

Injunction obtained either during term time or in the vacation.

An injunction may be applied for at any stage of the proceedings and may be obtained in vacation as well as in term time, whether the court be actually sitting or not, the court being always considered as open (*i*); but if the injunction be applied for in the long vacation after the court has risen, the plaintiff, instead of *moving*, should present a *petition* for the injunction, which petition should contain the substance of the bill supported by affidavit.

The duties of the vacation judge commences as each

(*g*) Sid. Sm. C. Pr. p. 820, 7th edit.

(*h*) Holden *v.* Waterloo, 15 W. R. 139; Maclaren *v.* Stainton, 16 Beav. 290.

(*i*) Temple *v.* Bank of England, 6 Ves. 771.

court rises, notwithstanding the vacation may not have actually commenced (*k*).

Writ of injunction.

As soon as the court has ordered the injunction, the plaintiff must obtain the writ under the seal of the court, and should be diligent in serving it; which is done by showing the party against whom it is issued the writ itself, and delivering him personally a true copy thereof. If the matter be very urgent, the plaintiff may serve the parties enjoined with a notice in writing, stating that an injunction has been granted, and that it will be sealed and served as soon as it can be passed, or he may serve the defendant personally with a copy of the minutes of the order signed by the registrar, at the same time showing the original. The plaintiff, however, must lose no time in serving the injunction (*l*). If the defendant reside abroad, and the injunction is to restrain proceedings at law, the court will allow service on his attorney or solicitor. Where an injunction has been granted, and the party against whom it issues absconds, service at the house which appeared to be the last place of his abode has been held to be sufficient (*m*).

Injunctions how dissolved.

The injunction, whether to restrain proceedings at law or for any other purpose is now granted until further order of the court, or until the hearing of the cause (Seton's Or.). The defendant having answered, could not have moved to dissolve the injunction, to restrain proceedings at law, except upon orders *nisi* and *absolute;* but now it would seem that the notice of motion to dissolve the injunction must be served in the usual way (*n*).

(*k*) Frances *v.* Browne, 8 Jur., N. S. 785; 10 W. R. 811, *S. C.*

(*l*) Van Sandau *v.* Rose, 2 J. & W. 264.

(*m*) 5 Ves. 147; 14 Ves. 205.

(*n*) Normanville *v.* Stanning, 10 Hare, App. 26; Pinchin *v.* Blackwall Railway Company, 3 W. R. 52—125.

CHAP. III.

Cause against dissolving.

On the day for showing cause against dissolving the injunction, the plaintiff may either show cause by excepting to the sufficiency of the answer, or procure the opinion of the court for scandal, or upon merits disclosed in the answer, why the injunction should not be dissolved at the next motion day.

If the plaintiff, after undertaking to show cause upon the merits against dissolving the injunction, should fail therein, the injunction is dissolved, and exceptions cannot be shown as a cause (*o*).

Judgment of court as to insufficiency of answer to injunction-bill.

If the plaintiff offer exceptions to the sufficiency of the answer, as cause against dissolving the injunction, he is to obtain the decision of the court thereon, within four days after the date of the order, to refer them, or, in default thereof, the injunction to stand dissolved (*p*).

Injunction; how dissolved.

An injunction may be dissolved, either by the defendant filing an affidavit against the plaintiff's case before answer, or upon the answer coming in, by a *notice of motion* upon the merits contained therein.

Under the 21 & 22 Vict. c. 27, in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, the court has power, if it shall think fit, to award damages (as a court only previously could do) to the party injured, either in addition to, or in substitution for, such injunction or specific performance. A power also is given to assess such damages, or to try any fact arising in any suit or proceeding, either by the court itself or by a jury.

To stay *waste*.

By the common-law a remedy of a *preventive* nature,

(*o*) Harcourt *v.* Ramsbottom, 3 Swan. 362.
(*p*) Goodinge *v.* Woodhouse, 14 Ves. 534.

called the writ of *estrepement*, lay after a judgment obtained in a real action before possession delivered by the sheriff, to prevent the defendant from committing waste in the lands recovered. The Statute of Gloucester added another writ, to prevent the defendant from committing waste *during the suit*, denominated the writ of estrepement *pendente placito*. But these writs have been abolished by the statute 3 & 4 Will. IV. c. 27, s. 36.

Stat. 3 & 4 Will. IV. c. 27.

Equity, however, very early assumed jurisdiction to restrain waste. "In restraining waste by persons having limited interests in property, the courts of equity have generally proceeded on the ground of the common law rights of the parties, and the difficulty of obtaining immediate preservation of property from destruction or irreparable injury by the process of the common law; but upon this subject the jurisdiction has been extended to cases in which the remedies provided in those courts could not be made to apply" (*q*).

An injunction will be granted either upon a mere threat to commit waste, or where the party is in the act of committing it, and for an *account* of so much waste as may have been done already. This at once prevents the commission of *future waste*, and compels, by a decree, compensation for the past (*r*).

Waste; *voluntary* and *permissive*.

Waste is that which does a lasting injury to the freehold or inheritance, and consists of two kinds—*voluntary* and *permissive*. The former is the spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder in fee-simple, or fee-tail (*s*). The latter is that which is the consequence of omission only, as where the tenant

(*q*) Mitf. Pl. 4th edit. 114. (*r*) Eden on Injunc. 160.
(*s*) Co. Litt. 53 (a).

CHAP. III.

suffers a house to fall down for want of necessary repairs. As a general rule it was held, that an injunction might issue for permissive as well as voluntary waste (*t*). But in Powys *v.* Blagrave (*u*) it was decided by Lord Cranworth on appeal, that a court of equity will not interfere to make a tenant for life liable in respect of permissive waste.

In whom punishable at common law.

By the common law, waste was punishable in three persons only—guardian in chivalry, tenant in dower, and tenant by curtesy, and not in a tenant for life or years. The reason assigned is, that the three former were created by act of law itself, which provided its own remedy against them; but the tenant for life or years coming in under demise and lease of the owner of the fee, the latter had the liberty of providing against committal of waste if he chose, and if he did not, it was his own default (*x*).*

The Statutes of Marlbridge, 52 Hen. III. c. 23, and of Gloucester, 6 Edw. I. c. 5, afterwards extended the writ of waste against farmers or other persons who held as tenants for life or tenants for years.

Statutes of Marlbridge and Gloucester;

By the Statute of Marlbridge, as well as by the common law, the punishment for waste was only single damages, except in the case of a guardian, who also forfeited his wardship, 9 Hen. III. c. 4; but the Statute of Gloucester directed that the tenant should forfeit the thing or place wasted, and also triple damages.

(*t*) Caldwell *v.* Baylis, 2 Meriv. 408.

(*u*) Powys *v.* Blagrave, 24 L. J., Ch. 142; 2 W. R. 359, 700; 1 K. 495; 4 De G., M. & G. 448; Warren *v.* Rudall, 29 L. J., Ch. 543; 1 J. & H. 1.

(*x*) Bl. b. ii. 282.

* The reason why the common law allowed so large a power to a tenant for life, "without impeachment of waste," was for the interest of the public, as timber might thereby circulate for shipping and other uses.—Packington's case, East. Term, 1744; 3 Atk. 216.

Under this statute it has been held that where there are two joint tenants for life or years, and one of them commits waste, this shall be deemed waste by them both as to the place wasted; but triple damages shall be recovered only against the person who actually committed the waste (*y*).

Effect of.

It was for some time contended that, under the Statute of Marlbridge, a tenant for life *absque impetitione vasti*, or without impeachment of waste, was not only at liberty to commit waste by felling timber, but also to apply the timber for his own use—such a tenant being thereby invested with a full power of cutting down timber and opening new mines for his own use, as if he had an estate of inheritance, and also of taking the timber if severed by others (*z*). Experience soon discovered the prejudicial and mischievous consequences resulting to the inheritance by so unrestrained a licence; therefore, although by the clause "without impeachment of waste," a tenant for life may commit waste for his own benefit, by cutting timber in a husbandlike manner, and opening mines and doing other acts of waste (*a*), yet, to prevent an unconscientious use of that power, the Court of Chancery will enjoin him from making *spoil* and *destruction* on the estate (*b*). And it was said by Lord Nottingham, in another case (*c*), that if a tenant for life commit waste *maliciously*, equity will restrain him, though he had express power to commit waste.

(*y*) 2 Inst. 302.

(*z*) 1 T. R. 56; Harg. Co. Litt. 220.

(*a*) Lewis Bowle's case, 11 Rep. 82 (b); Burgess *v.* Lamb, 16 Ves. 185; Cholmeley *v.* Paxton, 3 Bing. 211; Davis *v.* Wescomb, 2 Sim. 425; Woolf *v.* Hill, 2 Swans. 149; Waldo *v.* Waldo, 12 Sim. 107; Phillips *v.* Barlow, 4 Law Times, 130; *S. C.*, Verulam, Real Prop. Rep. i. 148.

(*b*) 2 Vern. 738.

(*c*) Abraham *v.* Buff, 2 Eq. Ab. 757; 2 Freem. 53.

CHAP. III.

The three general heads into which waste affecting the inheritance has been divided, are—1, in land; 2, in timber; 3, in houses; for the particulars of each, the reader is referred to Blackstone's Commentaries (*d*), or Eden on Injunctions (*e*), where the whole subject is summed up by each author with accuracy and precision.

Equitable waste.

Equitable waste is such as the *law* does not regard as waste, and for which, therefore, the legal tribunals afford no remedy; but which a court of equity esteems as waste, by reason of the manifest injury to the inheritance, although not inconsistent with the legal rights of the party committing it. Thus, where a tenant for life, *without impeachment of waste*, pulls down houses, and commits other wanton or malicious acts of waste, equity will restrain him *pro bono publico* (*f*). In the case, also, of a tenant in tail, after possibility of issue extinct, who is abusing his rights in a wanton and unconscientious manner, so as to inflict an injury upon the claims of other persons, he will be restrained from doing so, even though the act of waste should not extend to the absolute destruction of the estate, but in capriciously cutting down trees planted for the ornament or shelter of the premises (*g*).

Cases of equitable interference.

The cases in which the court of equity originally interfered to restrain waste were confined to privity of title; but its jurisdiction became gradually enlarged, to meet

(*d*) Bl. ii. 28.

(*e*) Ch. 8.

(*f*) Abraham *v.* Bubb, 2 Freem. Ch. Rep. 53; Aston *v.* Aston, 1 Ves. s. 265; Lord Barnard's case, Pre. Ch. 454; *S. C.*, 2 Vern. 738.

(*g*) Marquis of Devonshire *v.* Sandys, 6 Ves. 107; Lord Tamworth *v.* Lord Ferrers, 6 Ves. 419; Burgess *v.* Lamb, 6 Ves. 185; Day *v.* Merry, 16 Ves. 375; Attorney-General *v.* Duke of Marlborough, 3 Madd. Rep. 539.

the claims of adverse rights, not founded in privity of interest, such as the case of trespass accompanied with irreparable mischief. This interference is extended to cases in which the law affords but an imperfect remedy, or where it is wholly denied; and whenever a preventive and permanent remedy is indispensable against a wanton and capricious abuse of their legal rights and authorities, by persons having only a temporary and limited interest in the subject-matter (*h*).

How far the court proceeds in equitable waste.

And the court, in any of the above cases of equitable waste, will not only restrain the party from committing further waste, but will direct an account of the waste done, and will not suffer the individual to pocket the produce of the wrong, but will direct the money produced by such waste to be laid up for the benefit of those who succeed to the estate; and the remedy extends to the representative of a deceased tenant for life, without impeachment (*i*). In the case referred to, Sir John Leach, V.-C., said that the restraint upon the legal owner, as to equitable waste, was to be considered as founded on a breach of that trust and confidence which the devisor reposed in the tenant for life, that he would use his legal estate only for the purpose of fair enjoyment; that it was a trust in equity from the subsequent limitations, and from the presumed intention of the testator, that he meant an equal benefit to all in succession.

Infringement of patents, restrained by injunction.

4. We now come to speak of *injunctions* to restrain the *infringement of patents*. A patent is said by Mr. Stephen (Bl. Comm. ii. 86) to be a privilege granted by the crown to the first inventor of any new contrivance in the manufactures, that he alone shall be entitled, during a limited period, to make articles according to his own

(*h*) Story's Eq. Jur. ii. s. 918; Marquis of Lansdowne *v.* Marchioness of Lansdowne, 1 Madd. Rep. 136.

(*i*) Ormonde *v.* Ormonde, 5 Madd. Rep. 369.

CHAP. III.

invention. Patents were formerly looked upon with great jealousy, as being injurious monopolies; but are now regarded as beneficial to the public, by holding out inducements for the ingenuity and industry of inventive and intelligent men to exert themselves in promoting the cause of science, by disclosing the result of their labours for the benefit of mankind. Patents have been represented as bargains between the inventors and the public, to be judged of on the principles of keeping good faith, by making a fair disclosure of the invention, and to be construed as other bargains (*k*).

Patent; an act of royal favour.

The grant of a patent right is not to be considered as proceeding *ex debito justitiæ*, but as a pure act of royal favour. It must be a *novelty*, as well as an article formed by the hand of man (*l*): so that if a patent be granted for an article already known to the public in this country—whether the first discoverer were cognizant of it or not at the time he obtained his patent—the grant will be void (*m*); but its having originated and been communicated in a foreign country will form no impediment to its being valid here, for it will answer the words and intent of the Act, provided it be new within *this realm* (*n*).

Injunction obtained, in the first instance, in favour of an old patent.

If a patentee has been for a long time since the grant of the patent in the uninterrupted and exclusive enjoyment thereof, a court of equity will allow an injunction to issue against a person invading it, without putting the other party to try the validity of his patent by an issue at law (*o*); but when an injunction is sought against the

(*k*) Cartwright *v.* Arnott, 11 East, 107; Harmer *v.* Plane, 14 Ves. 132.

(*l*) King *v.* Wheeler, 2 B. & A. 350; Cornish *v.* Keene, 3 Bing. N. C. 570; Kay *v.* Marshall, 5 Bing. N. C. 492.

(*m*) 10 Bar. & Cres. 22; 5 & 6 Will. IV. c. 82, s. 2.

(*n*) 2 Salk. 447.

(*o*) Hill *v.* Thompson, 3 Meriv. 624.

violation of a patent, the plaintiff must, *at the time of applying*, depose to his belief that he is the original inventor: for although, as was observed by Lord Eldon, the party, when he obtained his patent, might very honestly have sworn as to his belief of such being the fact, yet information may have been communicated sufficient to convince him that it was not his original invention, and that he was under a mistake when he made his previous declaration to that effect. It sometimes happens that a patentee applies for an extended term for the exclusive use of his patent, and this is anything but as a matter of course, since in order to obtain it a very special case must be made out; that the novelty, merit, and utility of the invention must be proved, and it must be shown that all reasonable means have been used in order to make the invention productive; but that in spite of such exertions the remuneration by the inventor has entirely failed or has been quite disproportioned to his merits and the benefits conferred upon the public. And such a grant will be deemed a new grant by letters-patent, subject to the same conditions, open to the same objections, and generally entitled to the same advantages as the original grant (*p*).

The intervention of a court of equity in the piracy of copyrights or the infringement of patents is necessary, to finally establish the rights of the injured party; since, if no other remedy were given him, except the imperfect one afforded by an action at law, he might be ruined by the necessity of perpetual litigation (*q*). In such cases, unless there could be a discovery from the guilty party (such as a court of equity can only afford) as to the extent of the injury committed, it would be impossible to

The intervention of the Court of Chancery; why necessary in the infringement of patents, etc.

(*p*) *Re* Honiball's Patent, by appeal to Privy Council, 25 Law Times, 1.

(*q*) Harmer *v.* Plane, 14 Ves. 132; 8 Ves. 223; Jac. 472; 5 Russ. 322.

CHAP III.

ascertain the amount by any other means; for, in the case of a copyright, not only is the sale of copies by the defendant robbing from the author the profit upon the individual book, but may prove incalculably injurious to him in respect to the value and disposition of his copyright, which no inquiry for the purpose of giving damages could fully ascertain (*r*). Moreover, the preventive remedy, which the peculiar constitution of the equitable jurisprudence enables it to afford for the purposes of justice, renders it the only proper tribunal in matters of this kind; since the courts of law have no power to restrain the defendant from the future use of the plaintiff's invention nor the future publication of his work; neither can they prevent the defendant from so doing pending the action. In addition to this superiority over the common law courts, a court of equity will, at the instance of the plaintiff, direct an account in the one case of the books printed, and in the other an account of the profits which may have arisen from the use of the invention from the pirating defendants (*s*).

A suit instituted to restrain the infringement of a patent till trial of the legal right, is not one in which a jury can be summoned, as the suit is merely ancillary to the legal right (*t*).

It has been determined by Lord Campbell, C., that where novelty or infringement depends merely upon the construction of the specification, it is a pure question of law for the judges; but where the construction arises how far one machine, or a material part of one machine, imitates or resembles another in that which is the alleged

(*r*) Hogg *v.* Kirby, 8 Ves. 223—225; Wilks *v.* Aikin, 17 Ves. 424.

(*s*) Mitf. by Jerem, 138; Eden on Injunc. c. 12, 261; Sheriff *v.* Coates, 1 Russ. & My. 159; Story's Eq. Jur. ii. 933.

(*t*) Griffiths *v.* Tanner, 7 W. R. 322.

invention, it generally becomes a mixed question of law or fact which must be left to the jury (*u*).

Patent, not granted for a *principle* merely.

There cannot be a patent granted for a *principle* merely; but where the inventor claims the benefit of a principle connected with corporeal substances, or the benefit of certain mechanical combinations embodying that principle, so as thereby to produce effects in any art, trade, mystery, or manual operation, he may obtain a patent (*x*): but where the patent is of recent date, and an injunction is sought to restrain the invasion of it, if the party infringing it endeavour to show that there is no good specification, or for any other reason the patent ought not to have been granted, the court will not act upon the presumed validity of the patent, before the patentee has established his right at law; and the injunction will be refused unless the plaintiff will swear, to his belief, that he was the original inventor, and will undertake to bring his action immediately. But where the right of the patentee appears on record, as under letters-patents for a new invention, it is not necessary for the plaintiff to establish his right at law, previous to his filing an injunction-bill in a court of equity (*y*); and it has been said that possession under a colour of title is ground enough to enjoin and continue the injunction, till it is proved at law that it is only colour and not real title (*z*). But the court will not grant an injunction to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired (*a*).

(*u*) Seed *v.* Higgins—Higgins *v.* Seed, 3 L. T., N. S. p. 104.

(*x*) Bolton *v.* Bull, 2 H. Bl. 463; Minter *v.* Wells, 1 C. M. & R. 505; Jupe *v.* Pratt, Webb's Patent Cases, 144.

(*y*) Mitf. Pl. 147.

(*z*) 6 Ves. 707; 14 Ves. 130.

(*a*) 2 Mer. 446; see also Benwell *v.* Sims, 24 Beav. 307; 12 W. R. 1069; 14 W. R. 90; L. R., 1 Ch. 42.

CHAP. III.

Account of profits kept pending an injunction.

If, upon dissolving an injunction, and directing an issue at law, any matter of doubt present itself to the court as to the rights of the parties, it will sometimes order the defendant against whom the application is sought, to keep an account pending the trial of the issue, that the plaintiff, provided he establish his title at law, may be indemnified for the injury sustained by him on account of the invasion of his rights.

It has been recently held that the author of a literary work although an alien and not domiciled in any part of the British dominions, who, during the time of his temporary residence in a British colony, publishes in the United Kingdom a book, of which he is the author, is under the 5 & 6 Vict. c. 45, entitled to the benefit of English copyright (*b*).

Books, printed music, or *prints.*

To prevent the sale of *books, printed music*, or *prints.*—The principle upon which a court of equity proceeds in restraining by injunction the infringement of a copyright or sale of literary compositions, is stated by Lord Eldon to be, that damages at law do not give adequate relief. A copyright is the exclusive privilege which the law gives an author of printing and reprinting his own original literary labours.

The well-known case of Prince Albert *v.* Strange relates to the unpublished work of certain etchings which her Majesty and the Prince had made for their amusement. The plates were sent to a printer for the purpose of having a certain number of impressions taken from them for their own use. The defendant obtained possession, by purchase, of a number of impressions of the etchings from another person, with a knowledge at the time that the vendor had himself obtained such impressions through a breach of trust. The court, under the

(*b*) Routledge and others *v.* Low, L. R., 3 H. of L. Ca. 100.

circumstances, granted an injunction, and ordered the impressions to be delivered up, without giving the defendant an opportunity of trying the question of property at law (*c*). And in the same case (*d*) it was also held, that the defendant, having submitted to the injunction, could not object to an injunction grounded on the application of the Prince alone, restraining the publication of a catalogue or description of the etchings, on the ground that it was too extensive, as not clearly identifying which of such etchings belonged exclusively to his Royal Highness.

Trade marks.

Where there has been a palpable imitation of what are called *trade marks* to such an extent as to deceive purchasers, the court will interfere by injunction (*e*). And where one manufacturer has marked his goods with the known and accustomed mark of another manufacturer, so that the public are induced to believe the goods of the latter to be manufactured by the former, and there is the intention to deceive purchasers and to sell the fraudulently-marked goods, an action on the case will lie (*f*).

When necessary for plaintiff to establish his title at law.

When the question in dispute depends upon the effect of an agreement, the court will not interfere by injunction till the plaintiff's title has been established at law (*g*).

The claims of authors to the exclusive enjoyment of their copyright, whether in books, musical composition, or prints; the property of all original sculptures, models,

(*c*) Prince Albert *v.* Strange; The Attorney-General *v.* Same, 13 Jur. 507; 13 Law Times, 341.

(*d*) 13 Jur. 45, 109; 18 L. Jour., Ch. 120; 1 Macnagh. & Gord. 25; 12 Law Times, 367, 441.

(*e*) Edleston *v.* Vick, 18 Jur., Ch.; Dan. Ch. Pr. 4th edit. 1491, n. (*h*); 25 & 26 Vict. c. 88, s. 11; Shrimpton *v.* Saight, 18 Beav. 164; Seixo *v.* Provezende, 1 L. R., Ch. 192.

(*f*) Rogers *v.* Nowill, 5 C. B. 109.

(*g*) Walcot *v.* Walker, 7 Ves. 1.

CHAP. III.

etc., or patterns for linen, cottons, etc., depended till lately upon a series of statutes from 8 Anne, c. 19, to 54 Geo. III. c. 23.

As to publications *contra bonos mores*.

It has been decided that where the publication of a work is of such a nature as that the author could not maintain an action at law in reference to it, the court will not decree an account even upon submission in the answer (*h*). And if the publication of a work be *contra bonos mores*, and calculated to injure the public morals, as where it contains gross and libellous imputations, a jury would be directed to give no damages for pirating the copyright, and upon the same principle the court would refuse an injunction.

Usual cases of violating copyright.

Most of the cases of violating the copyright of a publication have arisen, not where a new work has been published as part of the old work, but where, under colour of a new work, the old one has been republished and copies multiplied (*i*).

Case in which an injunction will not be allowed.

When the matter which forms the subject of the alleged piracy comprises but a very inconsiderable part of the plaintiff's work, and contains merely calculations, and when the work complained of has been published some years, the court will not grant an injunction, but will leave the plaintiff to his legal remedy (*k*). Although, where a bill is filed to restrain the publishing or selling a work *merely literary*, it will, upon a proper case being made out, allow the injunction; yet where the bill prays that the defendant may be restrained from copying or *imitating* in the whole or any part of the plaintiff's book, the court will narrow the injunction by ordering the words "or imitating" to be struck out (*l*).

(*h*) Walcot *v.* Walker, 7 Ves. 1; Southey *v.* Sherwood, 2 Mer. 435.

(*i*) Hogg *v.* Kirby, 8 Ves. 223.

(*k*) Briley *v.* Taylor, 1 Rus. & My. 73.

(*l*) Per V.-C. K. Bruce, in Dickens *v.* Lee, 8 Jur. 185.

It has been held that a person may make a fair and *bonâ fide* abridgment of a work (*m*); but against a publication only colourably shortened, that being a mere evasion of the statute (*n*), the court will grant an injunction. *Bonâ fide* abridgment.

The same principle extends to *quotations*. Although a man may make use of what is denominated a *fair* quotation, yet he cannot under the pretence of so doing publish the whole or part of another's work (*o*); and it is said by Lord Ellenborough, in the case of Cary *v.* Kearsley (*p*), that a man may make use of another's labours for the promotion of science and the benefit of the public, but, having done so, the question will be, was the matter so taken used fairly with that view, and without the *animus furandi?* * *Quotations.*

Private letters having the character of *literary compositions*, upon proper application to the court, will be restrained by an injunction from publication (*q*). *Private letters.*

Musical compositions, being under the statute of Anne considered as writings, for the purpose of claiming protection under the Court of Chancery, are entitled to the same equities as any other species of authorship before mentioned, notwithstanding the published composition be contained within the compass of *a single sheet of paper only*, although for some time it appears to have been a *quæstio vexata* (*r*). *Musical compositions.*

The statutes which at different times have been passed Statutes for

(*m*) Giles *v.* Wilcox, 2 Atk. 143.

(*n*) Ibid.

(*o*) Bohn *v.* Bogue, 10 Jur. 420; 7 Law Times, 277—L. J.

(*p*) 5 Esp. N. P. c. 170; Murray *v.* Maxwell, 3 L. T., N. S. 466.

(*) See further as to what constitutes piracy, Pike *v.* Nicholas, 39 L. J., N. S., Ch. 435; 5 Law Rep., Ch. Ap. 251.

(*q*) Pope *v.* Curll, 2 Atk. 342.

(*r*) Hime *v.* Dale, 2 Camp. 28 (n.); Clemente *v.* Golding, ib. 25.

CHAP. III.

protecting printed books.

for regulating printed books are the 8 Anne, c. 19; the 41 Geo. III. c. 107; and the 54 Geo. III. c. 156. The period limited for commencing legal proceedings in any case of piracy relating to books is twelve months.

Prints and engravings.

The right which inventors of certain prints and engravings claim in the property of their works depends upon the statutes 8 Geo. II. c. 13; 7 Geo. III. c. 57; and the 17 Geo. III. c. 57. The Acts relating to sculpture are the 38 Geo. III. c. 71, and the 54 Geo. III. c. 56. The 3 & 4 Will. IV. c. 15 affects dramatic productions; the 5 & 6 Will. IV. c. 65 the subject of lectures; while the 6 & 7 Will. IV. c. 110 relieved the author from part of the tax imposed upon publications by the reducing the public-library copies from eleven (the number required by 54 Geo. III. c. 156) to five: in all these cases proceedings must be commenced within six months. By the 8 Geo. II. c. 13, the property of certain prints therein mentioned is vested in the inventors, etc. for fourteen years from the day of publishing, each of which prints shall be truly engraved with the *name* of the proprietor; and persons printing the same without the consent of the proprietor are to forfeit the plate, the sheets on which the prints are copied, and five shillings for every print, etc.

5 & 6 Vict. c. 45, relating to musical compositions.

The reader is now referred to the 5 & 6 Vict. c. 45, extending the privileges of authors to their copyright of books, musical compositions, and dramatic pieces; it extends the period also for commencing the action to twelve calendar months next after the offence committed, except as to the "public-library copies;" this statute repeals the 8 Anne, c. 19, 41 Geo. III. c. 107, and 54 Geo. III. c. 156.

But it has been recently held that where the proprietor of a theatre had dramatized the incidents of a novel written by the plaintiff, and had the play publicly performed,

it was not an infringement of the copyright either under the statute 5 & 6 Vict. c. 45, or at common law (*s*).

5 & 6 Vict. c. 100, as to copyright of designs.

The 5 & 6 Vict. c. 100, repealing the 27 Geo. III. c. 38, 29 Geo. III. c. 19, 34 Geo. III. c. 23, 2 Vict. c. 13, and 2 Vict. c. 17, consolidates and amends the laws relating to the copyright of designs for ornamenting articles of manufacture therein particularly set forth and described.

The 6 & 7 Vict. c. 65, amending the 5 & 6 Vict. c. 100, extends the protection of the last-mentioned Act to such designs as are not of an ornamental character, and not included therein.

These three Acts provide for the due registering of the proprietorship in the copyright of books and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, also the copyright of designs. See also 7 Vict. c. 12, s. 4, "An Act to amend the law relating to international copyright" (10th May, 1844); the 13 & 14 Vict. c. 104, s. 2, as to the copyright and registration of designs; and the 15 & 16 Vict. c. 12, as to "The International Copyright Act," and to explain the Acts relating to Copyright in Engravings. The 21 & 22 Vict. c. 70, and the 24 & 25 Vict. c. 73, relate to designs for articles of manufacture, and the 25 & 26 Vict. c. 68, to works of art, such as paintings, drawings and photographs.

Recent decision as to the respective rights of British and foreign authors to protection in their publications.

In a recent case (*t*) (which was an action for infringing plaintiff's copyright in a musical overture to an opera, called "Fra Diavolo"), it was held—first, that a British subject, by the common law, may freely print and publish in Great Britain any number of copies of a French work, without being exposed to an action at the suit of the French author, whose exclusive privilege, founded upon

(*s*) Reade *v.* Conquest, 3 Law Times, N. S. 888.

(*t*) Chappell *v.* Purday, 14 Mees. & Wels. 317-321.

CHAP. III.

the French law, is limited by the French territory; secondly, That although by the common law, a foreign author residing in another country can have no English copyright in a work published abroad before it is published in England: yet such foreign author, not having published abroad, first issuing his publication in this country, will be entitled to the benefit of the statutes relating to copyrights; but, by the provisions of the before-mentioned "International Copyright Act," the Queen may, by order in Council, direct that the works of authors first published abroad shall be entitled to a copyright therein in this country.*

Rules to be observed in seeking redress.

In order that a party may entitle himself to the penalty inflicted by the provisions of the statutes relating to engravings, it must be shown that the date and the name of the engraver is engraven on the print; but it has been the subject of considerable doubt whether, in default of these requisities, a party injured by the violation of his rights given by the statute, would be remediless at law or in a court of equity. In a case decided *in Banc.* (*u*), Lord Kenyon considered that the *date* was of importance, that the public might know the period of the monopoly;

* In referring to the case of Low *v.* Routledge (*supra*), which was determined under the 5 & 6 Vict. c. 100, it was held by the L. C. Cairns that the aim of the legislature is to increase the common stock of the literature of the country, and that if that stock can be increased by the publication for the first time here of a new and valuable work composed by an alien, who never had been in the country, his lordship saw nothing in the wording of the act which should prevent, and everything in the professed object of the act and in its wide and general provisions which should entitle such a person to the protection of the act in return and compensation for the addition he has made to the literature of the country. *Sed q.*

(*u*) Thompson *v.* Symonds, 5 T. R. 41; but see Blackwell *v.* Harper, 2 Atk. 95; Roworth *v.* Wilks, 1 Camp. 697; Harrison *v.* Hogg, 2 Ves. jun. 323.

and that the *name* should appear, that those who wished to copy it might know to whom to make application for consent.

Reluctance anciently observed by the court in protecting copyrights.

It is said that formerly the courts were very reluctant to interfere by injunction to restrain the violation of a copyright: thus, in an anonymous case, reported in Vernon (*x*), upon a motion by the king's patentees for an injunction to stop the sale of English Bibles printed beyond sea, Lord Keeper King refused the application, until the validity of the patent had been tried at law. The same judge also, in a subsequent case (*y*), refused to grant an injunction against printing Bibles, until the plaintiffs had brought their action in the King's Bench.

Notions of a more modern age.

Under the more modern practice, however, a different usage has been adopted: for, in cases where the circumstances warrant it, the party will be entitled to an injunction, not only to the hearing; but, upon proper application, a perpetual injunction will issue. For, in the case of the Universities of Oxford and Cambridge *v.* Richardson (*z*), Lord Eldon states that there were many instances in his own memory in which the court had granted or continued an injunction, although the title was not clear at law; that the court had lately said possession under colour of title is ground enough to enjoin.

Negotiable securities.

5. When *negotiable securities*, such as notes or bills of exchange, have been given for an illegal consideration, or are in any manner tainted with fraud, and are indorsed according to the usage of merchants, the indorsee will not *primâ facie* be affected with the fraud, if the indorsement take place *before they become due:* therefore, the court will interfere to restrain their further negotiation;

Rules of the court respecting them.

(*x*) Vol. i. 120.

(*y*) Hills and An. *v.* University of Oxford, 1 Vern. 275; see also Baskett *v.* Cunningham, 2 Eden, 137; Grierson *v.* Jackson, Irish T. R. 304.

(*z*) 6 Ves. 707.

and, viewing the case in the nature of a bill filed to restrain irreparable mischief, will grant a special injunction, on certificate of the bill filed, supported by an affidavit of the circumstances of the fraud (*a*). But where the notes or bills are assigned after they have become due, the case falls under the general rule that the assignee of a chose in action must take it subject to all the equities which attached to it immediately previous to the assignment. And thus, where a bond or covenant, obtained under circumstances of fraud, is assigned to a third person for a valuable consideration, and without notice, such *bonâ fide* assignee can have no remedy upon the bond, either at law or in equity. He has no remedy in equity because the bond was obtained by fraud. At law the old rule was, that a chose in action was not assignable. The courts of law have however since, in cases where the assignment of a chose in action is accompanied by a power of attorney enabling the assignee to sue in the assignor's name, so far abated the rigour of the old law as to recognize the equitable doctrine that such assignment is operative to transfer the interest of the assignor and to oblige him to allow the assignee to sue in his name (*b*). The assignee, therefore, cannot recover at law when by reason of fraud his assignor, in whose name he must sue, could have no remedy (*c*).

But as to bills of exchange and promissory notes, they are assignable at law. This exception from the general rule is made for the benefit of trade, and it carries with it the right to sue, unfettered by the equitable doctrine as to the assignee of a chose in action taking it subject to the equities. But if the assignment is made after the

(*a*) 1 Fonbl. Eq. 43; Patrick *v.* Harrison, 3 Bro. C. C. 476.

(*b*) Winch *v.* Keeley, 1 T. R. 619; Walsh *v.* Whitcomb, 2 Esp. 565; Smart *v.* Sandars, 5 C. B. 916.

(*c*) 1 Madd.

instrument has become due and should in the ordinary course of trade have been presented and paid, the courts of law have followed the same rule as equity, and held the assignee, even for value, to have no better title than the assignor had, as the benefit of trade does not require the contrary; the instrument comes disgraced to the indorsee, and it is his duty to make inquiries concerning it (*d*). Even in the case, however, where the party liable on the instrument has a defence at law against the assignee upon the ground of fraud, equity has a concurrent jurisdiction, and will order the instrument to be delivered up to be cancelled, and restrain the holder by injunction from proceeding at law (*e*).

Chose in action: assignment of.

An assignee of a chose in action, being entitled to all the remedies of the vendor, takes it also subject to the same equity as it was liable to in the assignor's hand; except where bills of exchange or promissory notes are assigned before they become due. These instruments may, in such cases, be enforced by an assignee for valuable consideration, though no consideration may have been given by the party who made the assignment to him. This rule has been adopted for the benefit of trade (*f*).

Injunction on behalf of a married woman's property.

The court will grant an injunction immediately upon bill filed, and an affidavit of facts, to restrain a husband from assigning his wife's property, in order to defeat her equity to a settlement out of such property (*g*). A court of equity will also interpose, by an injunction, to restrain the transfer of stock or the receipt of bank annuities.*

(*d*) Byles on Bills, 6th ed., p. 129.

(*e*) Byles on Bills, 6th ed., p. 131, citing Hodgson *v.* Murray, 2 Sim. 515; Hodgson *v.* Adams, Younge, 117.

(*f*) Madd. Ch. 688.

(*g*) 1 Fonbl. 44 (n).

* See the 4th sect., 5 Vict. c. 5, relating to the restraining of the transfer of or payment of any dividends on any stock in the public

CHAP. III.

Nuisances; public and private.

6. Nuisances are either *public* or *private*.

A public nuisance is that which affects many persons, or the community at large. A private nuisance is that which affects individuals, by erecting anything offensive, such as a swine-sty, stopping up or obscuring ancient lights, fixing a spout so near another's dwelling that the rain falls down and injures the foundation thereof, etc.

Public nuisance.

In the case of a *public nuisance*, the most usual and proper course is to file an information in the name of the attorney-general, whose consent must be obtained for that purpose (*h*); but it appears that an information is not in all cases of public nuisance absolutely necessary; for, if there be a special grievance arising out of a common injury, which affects certain individuals more than others, equity would, by analogy to the *qui tam* action at law, interfere to protect the private rights of those individuals; and there have been several instances of application, at the suit of private persons, to a court of equity, on the ground of public nuisance (*i*).

Although a public nuisance be such as to affect many persons, yet it may, at the same time, be of a private nature, where an individual suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance,—as if, by means of a ditch dug across a public way (which is a common nuisance), a man or his horse suffer any injury by falling therein; for this particular damage, which is not common to others, the party shall have his action (*k*).

funds or of any company, where, upon a summary application, an injunction is granted under the statute; but the party obtaining it must proceed to file his bill within due time afterwards. Marquis of Hertford *v.* Suisse, 8 Jur. 71.

(*h*) Attorney-General *v.* Heath, 18 Ves. 214, *argo.*

(*i*) Barnes *v.* Baker, Amb. 158; Mayor of London *v.* Bolt, 5 Ves. 129; Duke of Grafton *v.* Hilliard, cit. 18 Ves. 219.

(*k*) Bl. b. iii. 320.

In Spenser *v.* The London and Birmingham Railway Company (*l*), it was determined that where certain individuals suffer an injury from a public nuisance, quite distinct from that of the public at large, such individuals have a special right distinct also from that of the public at large; and the court will entertain a bill filed by them to be relieved from the nuisance.

Injunctions to restrain nuisances extend to such only as are nuisances at law: the fears of mankind, however reasonable, will not create a nuisance (*m*); but there are many acts indictable at common law as public nuisances, which cannot, from their nature, be cognizable in a court of equity. A brew-house, dye-house, smelting-house, lime-kiln, tan-pit, or pig-sty, if established in such inconvenient parts of a town as to incommode the neighbourhood, are common nuisances; and everything which causes not only an unwholesome smell, but renders life and property uncomfortable, is a nuisance (*n*), and may by possibility form a subject for the interference of a court of equity.

Purpresture.

The jurisdiction of a court of equity, in cases of purpresture* and nuisance, is founded on the right to restrain the exercise or the erection of that which would create irreparable damage to individuals, or to the public (*o*); so that, when a nuisance and purpresture in a

(*l*) 8 Sim. 193.

(*m*) Barnes *v.* Baker; *vide* Haines *v.* Taylor, 11 Jur. 73.

(*n*) Rex *v.* Pappineau, Stra. 686; Rex *v.* White, Burr. 333; Rex *v.* Neil, 2 Car. & P. 485.

* Or *pourpresture*, from the French *pourprise;* that is, when one encroacheth, or makes that several to himself which ought to be common to many (Coke, Inst. 2, 38); but which, in its common acceptation, signifies an encroachment on the king, either upon his demesne lands, or in the highways, rivers, harbours, or streets.

(*o*) 3 Atk. 751; Mitf. 155, 4th edit.

CHAP. III.

harbour are committed, an information in equity lies to abate them (*p*).

Private nuisance.

In cases of *private nuisance*—whether it relates to obscuring ancient lights, or lights not ancient, or altering windows so as to enlarge an already-acquired easement (*q*), but the enjoyment of which depends upon some covenant, diverting watercourses, and exposing the plaintiff to inundation, or any other material injury to the comfort of his existence—the court will, upon application, interfere by injunction to restrain a party from proceeding in the grievance which forms the subject of complaint.

Although there have been instances in which the court has granted an injunction to restrain the injury (*r*), and *where a plain case of nuisance* existed, Lord Hardwicke said the court will interfere upon affidavit, certificate, and notice, and will not suffer the nuisance to go on in the meantime (*s*); yet afterwards, in almost every case, it seemed to be necessary, both in *public* and *private nuisances*, that a judgment at law, ascertaining the rights of the parties, should be obtained previous to *granting* the injunction (*t*). But now, under 15 & 16 Vict. c. 86, s. 62, 21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42, the Court of Chancery must try the legal question involved, unless it deem it more convenient to send it to be tried at law (*u*).

(*p*) Attorney-General *v.* Richards, 2 Anst. 603. See also Attorney-General *v.* Forbes, 2 M. & C. 133.

(*q*) Cooper *v.* Hubbuck, 30 Beav. 160; Townend *v.* Wilson, 9 W. R. 30.

(*r*) Eliz. Bond's case, Mo. 238.

(*s*) 2 Ves. 453; 2 Dick. 488.

(*t*) Attorney-General *v.* Cleaver, 18 Ves. 211.

(*u*) See Fernie *v.* Young, 1 L. R., Ap. 63; Eaden *v.* Firth, 1 H. & M. 572.

Perpetual injunctions may be obtained for several purposes: *e. g.* against a bond given for the purchase of an office, and against a bond of resignation, the patron making an ill use of it, and against proving a will in a spiritual court, which, upon an issue at law, has been proved to be no will (*x*), and to restrain further litigation where plaintiff has been vexed by repeated ejectments at common law (*y*).

Bonds for purchasing an office, or for resigning a living, void.

Something similar to writs of injunction are bills of peace and bills of interpleader. A *bill of peace* is that which lies in cases where a person has a right which may be the subject of litigation between various persons, at different times, and by different actions; the court will thereupon, for the purpose of preventing a multiplicity of suits (*z*), direct the parties to try the validity of the title at law, and if the issue be favourable to the plaintiff, an injunction will be granted. In cases, however, where the plaintiff has been actually disturbed in his right, he ought generally, if he can, to try his right at law before coming into equity. Bills of this description have for their object a perpetual injunction, and are chiefly brought where there are disputes between lords of manors and their tenants, or the tenants of one manor and another, to prevent the endless actions of trespass which might otherwise be brought; since each action would only determine the particular right which formed the subject of it between the parties to the action (*a*).

Bill of peace.

A *bill of interpleader* is resorted to, where a person in possession of an object in which he claims no interest or title is in danger of being harassed by the conflicting de-

Interpleader.

(*x*) 1 Madd. Ch. 230.

(*y*) Mitf. 144.

(*z*) Baker *v.* Shelbury, 1 Ch. Ca. 70; 2 Atk. 484.

(*a*) Lord Tenham *v.* Herbert, 2 Atk. 483; Harrison *v.* Gardiner, 7 Ves. 310; Mitf. 145, 146.

CHAP. III.

mands of several other persons asserting their right to the same object in different or separate interests, and even though no action may be depending, and knows not to whom of the rival claimants he ought to deliver it up. The bill prays that such claimants may *interplead*,—that is, try their several rights among themselves, in order that the court may adjudge to whom the property belongs, and that the plaintiff may forthwith stand indemnified. The plaintiff must offer to bring the money or property into court. If the defendants have already commenced actions at law, or suits in equity, the injunction must be prayed for to restrain them from proceeding therein, until the right is determined (*b*). An affidavit may be read in support of the motion for an injunction (*c*). As soon as the bill is on the file, the plaintiff may, without waiting for the appearance of defendant, or even before service of subpœna, move *ex parte* for an injunction to restrain proceedings at law. The injunction on an interpleading bill, when obtained, does not, like the injunction to restrain an action at law, leave the plaintiff-at-law at liberty to demand a plea and proceed to judgment, but it stays all proceedings (*d*). Upon filing the bill, the plaintiff ought to annex an affidavit thereto, that he doth not exhibit his bill by *fraud* or *collusion* with the defendants, but *spontaneously* for his own security. If the plaintiff should neglect this formality, and the bill be in consequence demurred to, the court, which does not look upon interpleaders favourably, will not relieve the plaintiff who makes such default (*e*).

Bill of *Quia timet.*

Upon the same grounds of equitable interference, which

(*b*) Langston *v.* Boylston, 2 Ves. jun. 101.

(*c*) Dungey *v.* Angove, 3 Bro. C. C. 36.

(*d*) Warrington *v.* Wheatstone, Jac. 205.

(*e*) Metcalf *v.* Harvey, 1 Ves. 249; Jones *v.* Shepherd, 29 Beav. 293; Shepherd *v.* Jones, 3 De Gex, F. & J. 56.

induce the court, under a *bill of peace*, to relieve persons from being subjected to a multiplicity of suits for the same object,—or by means of a bill of interpleader, to compel several claimants of the same property to ascertain the party really entitled thereto, for the sake of indemnifying an uninterested stakeholder,—it will also lend its aid to a person who is apprehensive of being subjected to a future inconvenience or hardship, which may possibly have resulted from the negligence or inadvertency of another, and will quiet the party's apprehension by removing the cause of it. Thus, where property is bequeathed to one, subject to the life of another person still in existence, and he in remainder is desirous of securing it for himself, against any accident which may befal it previous to the time when it shall fall into possession or his legal remedy can be enforced, he may apply for that purpose, and the court will direct the tenant for life in possession to guarantee the property, by entering into a proper security, against any subsequent disposition or wilful destruction of it. A bill exhibited under these circumstances is called *a bill quia timet.*

Election between a court of law and equity.

Upon the general maxim, "Nemo bis vexari debet pro eâdem causâ," if a plaintiff proceeded both at law and in equity for the same thing, the court until lately would compel him to elect in which court he intended to proceed, the order providing, that the plaintiff, his clerk in court (now his solicitor), and attorney at law, having notice of the order, should, within eight days after such notice, make his election in which court he intended to proceed (*f*). But before the defendant was allowed to put

(*f*) Jones *v.* Earl of Strafford, 3 P. Wms. 90; Hole *v.* Pearse, 5 Hare, 408; Williams *v.* Roberts, 8 Hare, 315; Wedderburn *v.* Wedderburn, 2 Beav. 208.

the plaintiff to his election, he must not only have filed his answer, but the time also for the plaintiff's excepting to the answer must have expired, for it might have happened that, until he had a complete answer, the plaintiff could not decide in which court it was most advisable he should prosecute his claim (*g*). There is, however, an exception in the case of a mortgagee, who it seems may foreclose in equity, proceed to an ejectment at law, and bring an action on the covenant of the mortgagor to pay the money at the same time (*h*).

Time within which a party is bound to elect.

The time however for plaintiff to elect was first materially altered by the rules in chancery (9th May, 1839), and now by Ord. XVI. (8th May, 1845), Art. 20 & 21; 42 Cons. Or. A defendant whose answer is not excepted to, or not set down for hearing on former exceptions, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may, upon the expiration of eight days after his answer or further answer is filed, obtain as of course, on motion or petition, the usual order for the plaintiff to make his election in which court he will proceed (Ord. VII. 2nd Nov. 1850; 42 Cons. Or. r. 5). And the defendant whose answer is excepted to, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may, by notice in writing, require the plaintiff to set down the exceptions, within four days from the service of the notice. And if the plaintiff does not set down such exceptions within such four days, or if they are not allowed, the defendant is entitled as of course, on motion or petition, to obtain the usual order for the plaintiff to make his election in which court he will proceed (Ord. XIII. 2nd Nov. 1850; Ord. LI. 8th May, 1845; 42 Cons. Ord. r. 6).

(*g*) Brown *v.* Poyntz, 3 Madd. 25.
(*h*) Lyster *v.* Dolland, 1 Ves. 431.

A defendant from whom an answer is not required, alleging that the plaintiff is prosecuting him in this court and also at law for the same matter, may upon the expiration of the time within which he might have been served with interrogatories for his examination in answer to such bill, obtain as of course, upon motion or petition, the usual order for the plaintiff to make his election in which court he will proceed (42 Cons. Ord. r. 7).

The plaintiff however may move to discharge the orders obtained as above, upon the merits confessed in the answer, or, if necessary, appearing by affidavit (8th May, 1845, Ord. LI.; 42 Cons. Ord. r. 8).

Certiorari and *discovery* bills.

Of bills denominated *certiorari*, and bills of *discovery*, also bills to perpetuate the testimony of witnesses, we shall hereafter speak more fully. It is therefore only necessary to mention them in this place, as being sometimes made use of for the *prevention of fraud.*

Cases in which the court interferes to *redress* fraud.

II. Having in the foregoing division endeavoured to show in what manner the jurisdiction of the Court of Chancery exercises itself to *prevent* fraud, we shall now proceed to examine the second part of our subject, and see how the court will interfere to *redress* fraud after it has been committed.

Definition of Fraud.

Fraud, or *dolus malus*, is by the Civilians defined to be "omnis calliditas, fallacia, machinatio, ad circumveniendum, fallendum, vel decipiendum alterum adhibita" (*i*), which definition would perhaps be found to embrace the opinion our judges have formed respecting it; although, to give the courts of law and equity a fuller scope for relieving in every instance of deception and artifice that may be employed in all transactions made cognizable before their respective tribunals, they have refrained from

(*i*) D. L. 4, t. 3.

CHAP. III.

stating as a general proposition what really does constitute fraud (*k*), or to what extent they will relieve against it.

The Earl of Chesterfield *v.* Janssan, 2 Ves. sen. 125, is a case in which Lord Hardwicke, with his usual ability, has most systematically classified the various species of fraud against which a court of equity will relieve.

The master of the rolls, in a recent case (*l*), referring to the insidious manœuvrings of fraud, says, "Nobody has ever been able to define what fraud is, because it is so multifarious, so accommodative, that it adapts itself to various circumstances."

Fraud, then, is generally divided into *actual* and *constructive* fraud.

Fraud in a moral sense.

Actual fraud, or fraud in its highest degree of turpitude, may be considered as being little less than positive crime. And in ordinary cases of fraud it is the province of equity to undo the whole transaction and replace the parties in their former situation (*m*). But our courts of equity do not regard it in any other light than a civil injury, and will, certainly, in cases where artifice or collusion has been practised, give the injured party a remedy, not only against the fraudulent person, but will extend it also against his representatives (*n*), until the fraud is discovered. Length of time forms no bar to a remedy against fraud which is clearly proved; therefore the Statute of Limitations cannot be got up as a defence to a bill for the discovery of fraud (*o*). Delay will not purge

(*k*) Mortlock *v.* Bullen, 10 Ves. 306.

(*l*) Franks *v.* Weaver, 8 Law Times, 511.

(*m*) Daubury *v.* Cockburn, 1 Mer. 644.

(*n*) Garth *v.* Cotton, 3 Atk. 757; Bowen *v.* Evans, 2 H. L. C. 257; Charter *v.* Trevelyan, 11 Cl. & F. 740.

(*o*) Bicknell *v.* Gough, 3 Atk. 558; Marquis of Clanricarde *v.* Henning, 30 Beav. 175; and see Langley *v.* Fisher, 9 Beav. 90;

a fraud, for every delay arising from it, adds to its injustice and multiplies the oppression (*p*); and equity will exercise its jurisdiction and power to relieve in cases of fraud, where the remedy at law has been barred by the Statute of Limitations (*q*), although the courts will hesitate to relieve where length of time affords the presumption of acquiescence: for, after discovery, the defendant may avail himself of the stat. 3 & 4 Will. IV. c. 27, s. 26 (*r*).

Fraud in obtaining a will not cognizable in equity.

A court of equity cannot take cognizance of fraud in *obtaining a will*, relating either to real or personal estates (*s*). The consideration of the former pertains to a court of law (*t*): the latter is cognizable only before the Probate Court (*u*); although the Court of Chancery will interfere for the protection of property *pendente lite*, for probate and letters of administration (*x*). But if in a suit to administer trusts or secure any other equity the question of the validity of a will comes in question, the heir at law is entitled under the late Acts to have it tried under an issue by the court itself, or in a common law

Bladen *v.* King, 9 Ha. 499; Bowen *v.* Evans (*supra*), as to the effect of lapse of time in requiring the fraud to be clearly proved.

(*p*) Alden *v.* Gregory, 2 Eden, 285.

(*q*) 11 Jur. 115.

(*r*) Lewin on Trusts, 2nd edit. 917; 2 Sch. & Lef. 633; and see Marquis of Clanricarde *v.* Henning, as to what will be deemed discovery of the fraud.

(*s*) Even the 21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42, enabling the court to try all questions arising in a suit, do not give jurisdiction over a suit simply to try the validity of a will. Jones *v.* Gregory, L. JJ., 10 Jur., N. S. 59; 4 Giff. 468; 12 W. R. 193.

(*t*) And now by 20 & 21 Vict. c. 77, ss. 61, 63, to the Court of Probate. Powis *v.* Andrews, 2 Bro. P. C. 476.

(*u*) Ibid. 449; Archer *v.* Mosse, 2 Vern. 8.

(*x*) Ryves *v.* Duke of Wellington, 15 Law Jour., N. S., Ch. 461.

CHAP. III.

court (*y*), though this is not of right unless the evidence makes out a *primâ facie* case against the will if the heir be plaintiff (*z*). In all other cases of fraud, not penal, equity exercises a concurrent jurisdiction with courts of law (*a*); but, in a recent case, it was held that, notwithstanding this concurrent jurisdiction, there are courses of conduct which the Court of Chancery construes as fraudulent, and which come under the succeeding heads of frauds, but which courts of law would not notice (*b*).

Rules of law and equity, as to frauds, are the same.

The rules which have been laid down upon this subject are the following (*c*):—1, That the rules of law and equity respecting fraud are the same,—*i.e.* that it must never *be presumed*, although that may be a fraud in equity which is not so at law; 2, If the principal in a fraud be released, those who were only *secondarily* liable cannot be proceeded against; 3, A deed which is impeached for fraud cannot be supported by evidence of considerations wholly different from those stated in it; 4, If a deed be obtained by fraud, it will be set aside *in toto*, and not in part only (*d*).

Suggestio falsi.

The *suggestio falsi* is not in every instance relievable in equity; as where, on the part of the vendor, there is a false affirmation of value, or a vague recommendation of the property intended to be sold, denominated by the civil law *simplex commendatio*, because the purchaser is bound to use his senses, and ought not to rely on such wild unmeaning expressions as are used by vendors in

(*y*) Egmont *v.* Darrell, 1 H. & M. 563; Williams *v.* Williams, 33 Beav. 308; Davenport *v.* Goldney, 2 H. & M. 282.

(*z*) Cowgill *v.* Rhodes, 33 Beav. 312.

(*a*) Colt *v.* Woolaston, 2 P. Wms. 136.

(*b*) Clark *v.* Manning, 7 Beav. 162; 9 Jur. Dig. 230; Middleton *v.* Sherbourne, 4 You. & Coll. Eq. Ex. 378.

(*c*) 1 Madd. 261.

(*d*) 2 Dow. 266, Dom. Proc.

praise of their goods, or the misrepresentation in a trifling matter or a matter of opinion. "But even in the chaffering about goods," said Lord Eldon, in Sibald *v.* Hill (*e*), "there may be such misrepresentations as would set aside the contract. When the representations were made under such circumstances and in such a way that they took the confidence of the purchaser, and induced him to act when otherwise he would not; this was a fraud which would affect the sale." And, where there has been a statement given by the vendor, with the intention to deceive in a matter which lies within his own knowledge, and the circumstances are such that the purchaser is not bound to inquire further, as when the vendor asserts that a greater rent is paid for the estate than is actually received, a remedy will lie against him (*f*); for the value of the rent is only known to the vendor himself, and the purchaser, after all his diligence, must rely on his (the vendor's) statement of the fact. Equity will also relieve a person who, by false representation, has been induced to enter into a contract, whether the party making the misrepresentation was aware of it or not (*g*).*

Suppressio veri.

A *suppressio veri*, when it amounts to a fraudulent concealment, is a matter for relief in equity, especially if the party suppressing the truth endeavours to take advantage of the mistake which another has been led into, in consequence of such concealment; and it was said by the lord keeper, in Salkeld *v.* Vernon (*h*), that no rule

(*e*) 1 Madd. Ch. Pr. 261.

(*f*) Sug. V. & P. 14th edit. 4.

(*g*) Neville *v.* Wilkinson, 1 Bro. C. E. 546; Evans *v.* Bicknell, 6 Ves. 174; Broderick *v.* Broderick, 1 P. Wms. 239.

* Sug. V. & P. 14th edit. 5, 244, 273; Small *v.* Attwood; Attwood *v.* Small, appeal, 1 Younge, 407; 6 Clk. & Fin. 232; Pulsford *v.* Richards, 17 Beav. 95; Rawlins *v.* Wickham, 1 Giff. 355; 3 De G. & J. 304; Barry *v.* Croskey, 2 J. & H. 1.

(*h*) 1 Eden, 69.

CHAP. III.

was better established than that every deed, obtained on *suggestio falsi* or *suppressio veri*, was an imposition in a court of conscience (*i*).

Bath *v.* Montague.

Lord C. J. Treby, in Bath *v.* Montague (*k*), mentions a case that had been previously tried in the Court of Chancery, upon the Civil Law doctrine relating to surprise. A man was informed by his kinsman that his son was dead, and so got him to settle his estate upon him. This is known in the Civil Law as *surreptio*, and is thus defined:—"Est cum per falsam rei narrationem aliquod extorquetur." When a man will, by false suggestions, prevail upon another to do that which otherwise he would not have done. His Lordship said he doubted not but that equity would set aside such a transaction, upon the ground of fraud.

Inadequacy of consideration, how far deemed fraudulent.

There has been no little doubt in our courts respecting the subject of inadequacy of consideration—*i. e.* how far unfairness of price will be suffered to affect a contract. When persons stand upon a precisely equal footing with each other, the Court of Chancery takes no account of inadequacy of price, unless from its grossness it is evidence of fraud. In two well-known cases (*l*), which are usually cited for the sake of the quotation contained in them, we have the opinion of Lord Eldon on the subject; in one of which, after showing that, although a bargain may be unconscionable, yet it may be valid, he adds, "Unless the inadequacy of the price be such as *shocks the conscience*, and amounts in itself to conclusive evidence of fraud in the transaction;" in the other he says, "The inequality must be so gross, as that a man would *start at the bare mention of it.*" Now, as all men's con-

(*i*) Sug. V. & P. 14th edit. 5, 214, 273.

(*k*) 3 Ch. Cas. 74.

(*l*) Coles *v.* Trecothick, 9 Ves. 246; Astley *v.* Weldon, 2 Bos. & Pull. 351.

sciences are not governed by the same principles—some possessing a greater amount of flexibility than others; insomuch, that where the high-toned sensibility of the moralist would be shocked and scandalized at the bare mention of a hard-fought bargain, that of the keen, sharp-dealing, veteran stock-jobber would lead him to regard it as merely a happy, business-like transaction—it will follow that, to fix the standard of inequality of consideration to that point which is to shock the conscience, would be to establish a medium as variable as human opinion itself, and would answer no other purpose than the endeavour to fix the length of each chancellor's foot as the statute measure of the realm; which would be, according to a high legal authority, an uncertain measure indeed,—for one chancellor has a long foot, another a short foot, and a third an indifferent foot (*m*).

Inadequacy must be fraudulent, to set aside a contract.

The ground, then, of setting aside a contract for inadequacy of consideration is *fraud;* and it has been said, that there exists no case where mere inadequacy of price, independently of other circumstances, has been held sufficient to set aside a contract (*n*). A bill, therefore, to avoid an agreement for inadequacy or oppression, must be preferred under colour of fraud; which may be proved by the facts attending the transaction, either on the face of the instrument, or by extrinsic evidence; the basis must be gross inequality (*o*). But other circumstances, such as that vendor is of feeble intellect, or in distress, or not conusant of his rights, or undue means have been used by purchaser, may help to prove the fraud;

(*m*) See Selden's Table Talk, tit. Eqy., quoted in a note to Bl. Comm. b. iii. 432. See 2 Swans. 414 (n).

(*n*) Griffith *v.* Spratby, 2 Bro. 180 *n*; Lowther *v.* Lowther, 13 Ves. 103.

(*o*) Sug. V. & P. 14th edit. 273, 275; Weldon *v.* Edwards, 2 Ves. 518.

CHAP. III.

and the court will be vigilant to discover an excuse for refusing to enforce a contract where the price is inadequate. By the rules of the civil law, a contract for half the value might have been set aside. Also, where a party has, through surprise, been induced to enter into a contract, and seeks to be relieved from it in a court of equity, he must show the surprise to have been such as was accompanied with fraud and circumvention (*p*); but there may be matters which, upon the suggestion of fraud, the court will take cognizance of, and will even relieve against, yet may not amount to fraud in its sense of moral turpitude, but merely in a technical signification (*q*). It is a well-established rule in equity, that where one of two innocent parties is called upon to suffer for the fraudulent conduct of a third, it is more equitable that he who puts it into the power of such third person to commit the fraud should suffer than he who is merely passive.

Constructive fraud.

Constructive fraud arises chiefly from transactions which a court of equity conceives itself bound for the sake of public policy to discourage and set aside, although they may not have arisen from any evil or fraudulent design against another, or been engaged in for the sake of procuring any undue advantage in favour of the person chargeable therewith. Under the head of constructive or virtual fraud, therefore, may be comprised many of the subjects mentioned in the earlier part of this Chapter, as for instance, in respect to the dealings between persons in confidential relations, as also some others alluded to hereafter.

A voluntary settlement, when fraudulent.

A voluntary settlement, although binding against the party who makes it, will frequently be set aside in a

(*p*) 3 Ch. Ca. 114, 115.

(*q*) *Vide* Glascott *v.* Lang, 9 Law Times, 3; 11 Jur. 182.

court of equity as *fraudulent:* and, by the stat. 27 Eliz. c. 4, settlements which are voluntary are deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even where there has been a previous notice of such voluntary settlement. This statute, however, does not refer to or affect settlements of personal estate. But it includes chattels real (*r*).

But the settlor himself cannot sustain a bill in equity for specific performance of an agreement which is to defeat that settlement; he has no right to disturb it; against him it is valid and binding: when he seeks to get rid of it, the court will not impede him, but it will not assist him (*s*).

By the 13 Eliz. c. 5, conveyances and alienation of real or personal property which can be taken in execution, or is liable to the payment of debts (*t*), made with intent to defraud creditors, is voidable under these Acts against the creditors delayed or hindered in their actions.

Creditors.

Where a voluntary conveyance is made by a solvent person even in favour of his child, it has been held good against subsequent *creditors* (provided the deed does not contain a power of revocation, and there is no retention of possession), though he should become insolvent, but not against *purchasers* (*u*).

If the donor at the time of such voluntary conveyance, was indebted as far as insolvency, or if largely indebted at the time of making the settlement, and dies in debt, the person, for whom it was intended, cannot claim the

(*r*) Co. Lit. 3 b.; Oxley *v.* Lee, 1 Atk. 624.

(*s*) Wat. Conv. by Morley and Coote, 8th edit. 296 *n*; Smith *v.* Garland, 2 Mer. 123.

(*t*) Sims *v.* Thomas, 12 A. & E. 536; Tarnley *v.* Hooper, 2 Jur., N. S. 1081.

(*u*) Russell *v.* Hammond, 1 Atk. 15, 16; 2 Ves. jun. 293; Batterbee *v.* Farrington, 1 Swan. 106.

benefit thereof against the creditors of the donor. But a *purchase*, in the name of a wife or child, is not within the Act (*x*).

From this latter case we may observe, where an insolvent person makes a *post-nuptial* settlement, it is void against existing creditors; because he is, in fact, assuming to give away property which does not belong to himself, but to his creditors: but after creditors must take the settlor's property as they find it: for in trusting him they are not supposed to do so upon the credit of the fund, which has already been divested from him by the settlement, but upon that of which he is already the ostensible owner (*y*).

By a late case of Spirett *v.* Willows (*z*), a settlement made by a donor perfectly solvent was held void against creditors then existing and remaining unpaid; and subsequent creditors will in such case be entitled to share, and can file a bill to avoid the settlement (*a*).

Settlement *before* marriage in fraud of creditors, not relievable against.

If a man *before* marriage settle all his property, of whatsoever kind it may be, upon his intended wife, though he should be indebted at the time, and she were aware of the circumstance, yet the transaction cannot be impeached, even in favour of creditors; for marriage is in itself a valuable consideration, and is a contract which

(*x*) Sug. V. & P. *Vide* Meek *v.* Kettlewell, 1 Har. 473; Fletcher *v.* Sedley, 2 Vern. 490; Skarf *v.* Soulby, 13 Jur. 89; 7 Mac. & Gor. 373; Jenkyn *v.* Vaughan, 3 Drew. 419; Re Magawley's Trust, 5 De Gex & Sm. 1; Barton *v.* Van Heythuysen, 11 Hare, 126; French *v.* French, 6 De G., Mac. & Gor. 95.

(*y*) Taylor *v.* Jones, 2 Atk. 600; Lord Townsend *v.* Wyndham, 2 Ves. 10; *vide* Ede *v.* Knowles, 2 You. & Coll. 178.

(*z*) Spirett *v.* Willows, 34 L. J., Ch. 365; 11 Jur., N. S. 70; 3 D., J. & S. 302.

(*a*) Jenkyn *v.* Vaughan, 3 Drew. 419; Freeman *v.* Pope, L. R., 9 Eq. 296; L. R., 5 Ch. Ap. 538; 39 L. J., Ch. 148; Skarf *v.* Soulby, 1 M. & G. 373.

prevents the parties from being again placed in the same situation as they formerly were. So also, if a settlement be made *subsequent* to the marriage, in pursuance of a bond or other agreement before marriage, or upon an agreement to pay money (if it be afterwards paid), it will be valid, both against creditors and purchasers, provided no fraud be mixed up with the transaction (*b*).

By the 91st section of the Bankruptcy Act of 1869, any voluntary settlement of property, if the settlor shall become bankrupt within two years after the date of such settlement, will be void as against the trustee of the bankrupt, and if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement it shall be void, unless the parties claiming under it can prove that the settlor was at the time of making the settlement able to pay all his debts, without the aid of the property comprised in such settlement.

A court of equity will afford no relief where a voluntary grantee has conveyed to a *bonâ fide* purchaser for valuable consideration without notice of the claims of other purchasers or (*sed quære*) of creditors (*c*). Nor will equity interfere in favour of a voluntary settlor to aid him to complete a contract for sale against a purchaser (*d*).

But it may be well to notice an exception to the general rule in the case of a charity, namely, that where a purchaser has notice of a gift to a charitable use, or buys without notice from a purchaser with notice of such a gift, he takes subject to it; though, on the other hand, if he has no notice, and has not purchased from a purchaser with notice, he will have the same protection as

(*b*) Brown *v.* Jones, 1 Atk. 190.

(*c*) Story, s. 434.

(*d*) 2 Spence, 289; Pulvertoft *v.* Pulvertoft, 18 Ves. 84; Barton *v.* Van Heythuysen, 11 Ha. 131.

CHAP. III.

he would have against an ordinary voluntary conveyance (*e*).

A voluntary conveyance against a voluntary conveyance.

Where there is a voluntary conveyance against a voluntary conveyance, the parties will be left to try their right at law; and where one party has no more equity than another, their rival claims will be tested by the well-known maxim, "*Qui prior est in tempore, potior est in jure.*" Thus, in a certain case, the husband, by articles before marriage, agreed to settle the lands upon his wife by way of jointure; after marriage he refused or neglected to make a conveyance pursuant to the articles, but mortgaged the lands to one who had no notice of the articles; the wife was not allowed to have the articles executed against the mortgagee (*f*): for a creditor has an equal equity with a purchaser (*g*).* This may appear to be, and doubtless is, a gross fraud upon the wife: still the purchaser, who has paid his money, and gained the legal estate in addition, must not suffer. In such an event, the court cannot relieve the lady against the *bonâ fide* purchaser; therefore the sentiment once uttered by Mr. Justice Twysden may be considered as squaring with the broad rule of equity: *i. e.* "We must not steal leather to make poor men's shoes" (*h*).

Where two purchasers with equal equities.

Settlement; when fraudulent against a husband.

If a woman (being *sole*) secretly, on the eve of her marriage, convey her property to a stranger, without the

(*e*) 2 Spence, 289.

(*f*) 2 Ventr. 343.

(*g*) *Vide* Francis's Maxims, 14, case 7.

* But where the articles were handed over to the mortgagee, they were held to give him a sufficient notice of the parties claiming under the articles and a distinct intention of benefiting the issue of the marriage, and could not have misled even an unprofessional person. Davies *v.* Davies, 4 Beav. 54; Atterbury *v.* Wallis, 8 De G., M. & G. 454.

(*h*) Earl of Plymouth *v.* Hickman, 2 Vern. 167.

knowledge of her intended husband, this will be deemed a fraud, and will not, after marriage, exclude the marital rights from attaching on the property (*i*).

Arrears upon a voluntary bond.

If arrears have accrued upon a voluntary bond, they will constitute a valuable consideration, although the bond or instrument itself be void against creditors (*k*).

Actual fraud, other cases of.

On incapable persons.

Advantages taken of persons incapable from weakness, infirmity, age, lunacy, idiocy, drunkenness, duress, terror, infancy, great distress, coverture, &c., from taking due care of or protecting their own rights and interests, come under the head of actual fraud, there being a fraudulent intention, some of which are not relievable at all at law, but only in equity (*l*).

In the case of drunkenness it must be so excessive that the party is utterly deprived of his reason and judgment, so that there can in no just sense be said to be a serious and deliberate consent on his part; and unless it be so great as that the court will not interfere, unless there be also some other things to show unfair dealing (*l*).

Gifts from extremely aged persons.

A gift or voluntary conveyance from a man bordering on extreme old age, accompanied with a weakness of mind, will be viewed with jealousy by the courts; for if any imposition, undue influence, or stratagem, appears to have been resorted to by persons, in whose favour the gift is made, to procure it, such conduct will be a ground for setting aside the conveyance (*m*). But old age, where there is no proof of fraud, will not invalidate a transaction (*n*). Neither is *weakness of mind*, provided it does

(*i*) Draper's case, 2 Freem. 29; Pett *v.* Hunt, 1 Vern. 18.

(*k*) Gilham *v.* Locke, 9 Ves. 612.

(*l*) Story, Eq. Jur., s. 221, *et seq.*

(*m*) Bridgman *v.* Green, Wilmot's Cases, 61; see also Hunter *v.* Atkins, 3 My. & K. 113.

(*n*) 1 Madd. Ch. 376.

CHAP. III.

not sink into that state in which a man is said to be *non compos mentis*, a sufficient reason for rendering void a contract, unless fraud should appear in procuring it: "For the court will not measure the size of people's understandings or capacities; there being no such thing as an equitable incapacity where there is a legal capacity" (*o*).

But where an illiterate and weak-minded old man, not absolutely sunk into such a state of mental imbecility as to be incapable of managing his own affairs, but in such a state of mental incapacity as to render it necessary that he should have protection and advice, executed a deed of conveyance of his property for a grossly inadequate consideration, the court, on a bill filed by the heiress-at-law and her husband, declared that the deed must be set aside as an absolute conveyance, and stand as a security only for money advanced by the purchaser and properly expended by him on the property (*p*).

There must be something in the terms or circumstances of the contract to show that the weakness has been taken advantage of (*q*).

Underhand agreements.

Underhand agreements, such as where a debtor by any additional security does that which would amount to a fraudulent preference, are void in equity as actual frauds.

Marriage-brokage bonds. Constructively frauds.

Marriage-brokage bonds are contrary to public policy, as tending to introduce improper and improvident marriages.—The court appears very early to have set its face against transactions of this kind; for, in the case of

(*o*) Osmond *v.* Fitzroy, 3 P. Wms. 131.

(*p*) Longmate *v.* Ledger, 6 Jur., N. S. 481—V. C. S. See also Nottidge *v.* Prince, 2 Giff. 264; 6 Jur., N. S. 1066; 29 Law Jour., Chan. 857.

(*q*) Story, Eq. Jur., s. 238.

Arundel *v.* Trevillian (*r*), during the reign of Charles I., the plaintiff had entered into a bond or bill of £100 to the defendant, for effecting a marriage between the plaintiff and Eliza, his then wife, which was brought about accordingly; but the court, disliking the consideration whereupon the bill was given, the same being of dangerous consequences, *upon reading precedents* wherein the court had given relief in like cases, thought it not fit to allow any countenance to speculations entered into upon such contracts, and decreed the bill to be cancelled.

Difference between a staid widow and a young maiden, as to marriage bonds.

The court, however, in a more recent case (*s*), A.D. 1686, seemed to have made a distinction between a bond given by one party to another to assist the obligor to his marriage with a widow forty-five years of age, and a young maiden that had not friends to advise her; the court giving relief, and setting aside the instrument in the latter case, although not in the former. And, in detestation of fraud, equity has set aside not only articles, agreements, conveyances, etc., but even fines, recoveries, judgments, and other matters of record (*t*).

Scott *v.* Tyler.

Provisions, also, in a deed or will, tending to restrain marriage, are discountenanced by the courts: Lord Thurlow, in Scott *v.* Tyler (*u*), in his judgment dated 1788, adverting to the general principles and decisions upon the subject of clauses in restraint of marriage, enters fully into the subject.

Fraudulent alienations by executors, also, are all of them transactions which will be relieved against in a court of equity.

Lastly, it is to be observed that there are many cases

(*r*) 1 Rep. Ch. 47.

(*s*) Drury *v.* Hooke, 2 Ch. Cas. 176; S. C., 1 Vern. 412, and the note.

(*t*) Waller *v.* Dalt, 1 Ch. Cas. 276.

(*u*) 2 Dick. 717.

CHAP. III.

in which a court of equity may not deem the circumstances sufficient to avoid a transaction on the ground of fraud, and yet it will not assist the party whose conduct is in question; for a plaintiff should come into equity with clean hands (*x*).

In connection with the subject of injunction may be mentioned certain powers of the court, which are known by the names of Restraining Orders, Stop Orders, and Distringas upon Stock; and first of—

Restraining Orders.—The 40 Geo. III. c. 36, enables a court of equity, before or upon hearing any cause depending therein, to order the governor and company of the Bank of England to suffer a transfer of stock standing in their books to be made, or to pay any accrued or accruing dividends thereon, belonging to or standing in the names of any party to a suit, as such courts may deem just, or to issue an injunction to restrain them from suffering any transfer of such stock, or from paying any dividends or interest accruing or accrued due thereon, although such governor and company are not parties to the suit in which such decree or order shall be made.

But it was necessary, in order to obtain an injunction under this Act, that a suit should have been instituted, and then it must only have been upon a special application upon notice to the defendant. The Act dispensed with the necessity of making the bank a party, but it provided no summary procedure, and it did not apply to stocks in public companies. On these grounds it was enacted by 5 Vict. c. 5, s. 4, that it shall be lawful for the Court of Chancery, upon the application of any party interested, by motion or petition, in a summary way, without bill filed, to restrain the governor and company of the Bank of England, or any other public company, whether incorporate or not, from permitting the transfer

5 Vict. c. 5.

(*x*) See Cook *v.* Clayworth, 18 Ves. 12.

of any stock in the public funds, or any stock or shares in any public company, which may be standing in the name or names of any person or persons, or body politic or corporate, in the books of the governor and company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon; and every order of the said Court of Chancery upon such motion or petition as aforesaid shall specify the amount of the stock, or the particular shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing; provided always, that the said Court of Chancery shall have full power, upon the application of any party interested, to discharge or vary such order, and to award such costs upon such application, as to the said court shall seem fit.

An application under this Act must be accompanied by an affidavit showing special grounds for the intervention of the court (*y*), and the order, when once obtained, will continue in force until an application to discharge the same; but the party obtaining the order ought to file his bill within a reasonable time, since it is only granted for interim purposes (*z*). And in discharging the order the court will be guided, not merely by the statements contained in the answer (if any), but also by the affidavits filed both in opposition to, as also in support of the answer.

Stop orders.

Stop Orders.—When any person is entitled to any stocks or funds *standing in the name of the accountant-general* of the court, either to the general credit of any particular cause, or to the account of any person, the court will grant a *stop order* for the purpose of restraining

(*y*) *Ex parte* Field, 1 Y. & C. 1.

(*z*) *Re* Marquis of Hertford, 1 Hare, 584; 8 Jur. 71; 1 Ph. 203.

CHAP. III.

the transfer or payment of such stocks or funds, or any part thereof, without notice to the assignee of the person entitled in expectancy or otherwise to any share or portion of such stocks or funds. Before the passing of the 15 & 16 Vict. c. 80, a special application was made to the court upon petition before the order could be obtained. But by the 26th section of the above Act, the master of the rolls and vice-chancellor, while sitting at chambers, may dispose of such matters as each such judge may from time to time see fit.

Applications for, at chambers.

Applications for stop orders may now be made by summons at chambers, where the assignor and assignee concur (*a*), otherwise the application will still be by petition; and then both the title of the assignor, and the assignment by him to the assignee, must either satisfactorily appear or be proved by affidavit (*b*).

Upon the order being granted, it is drawn up, passed, and entered; copies of which are afterwards served on the solicitor of the party in whose name the fund is standing, and at the accountant-general's office, where a minute of it is made in the books.

When the order has been served, the fund to which it relates will not be paid out until the order is discharged, or an order is made directing payment notwithstanding the stop order.

The parties to the cause (if any), or the persons interested in parts of the funds not to be affected by the order, need not be served with the petition or summons (*c*).

By the 1 & 2 Vict. c. 110, s. 14, if any judgment debtor shall have any government stocks, funds, or annuities, or

(*a*) Edmonson *v.* Harrison, Week. Rep. 140.

(*b*) Quarman *v.* Williams, 5 Beav. 133; Wood *v.* Vincent, 4 Beav. 419.

(*c*) Cons. Ord. 26, rr. 1, 2.

any stock or shares of or in any public company in England (whether incorporated or not), standing in his own name, in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. But no proceedings to have the benefit of such charge must be taken until after the expiration of six calendar months from the date of the order. See also 3 & 4 Vict. c. 82, extending the operation of the above section to funds in court. After such charging order has been obtained the Court of Chancery will grant the creditor a stop order (*d*).

Distringas on stock.

Distringas on Stock.—Before the passing of the 5 Vict. c. 5, the Court of Exchequer was divided into two branches, the one called the equity side and the other the plea side of the Exchequer; but by that Act the equity jurisdiction is transferred to the Court of Chancery. Whilst the two branches of the Exchequer Court were united, any party being desirous of restraining the transfer of stock or payment of dividends by the Bank of England, might obtain a distringas from the Court of Exchequer against the bank, and serve it upon the secretary of the bank, together with a notice not to permit the transfer of the stock or payment of the dividends in such notice specified.

By section 5 it is enacted, that instead of the writ of distringas as theretofore issued from the Court of Exche-

(*d*) Set. 958.

quer, a writ of distringas, in the form set out in the first schedule to the Act, should be issued from the Court of Chancery, and be sealed at the Subpœna Office, which should have the same force and effect as was then in force in the said Court of Exchequer.

But a party having obtained a distringas under this section is not precluded, upon a proper question of merits, from afterwards obtaining a restraining order under the 4th section of the same Act (*e*).

Any person claiming to be interested in any stock transferable at the Bank of England, standing in the name or names of any other person or persons, or body politic or corporate, in the books of the governor and company of the Bank of England, may, by his solicitor, prepare a writ of distringas pursuant to the said Act, in the form set out in the first schedule to the Act, and may present the same for sealing at the Subpœna Office (Ord. I. 17th Nov. 1841; 27th Cons. Ord. r. 1). The writ, when sealed, which was formerly done at the office of the patentee of Subpœna Office, but now at the Office of the Clerk of the Records and Writs, is, together with a notice, taken to the Bank of England and served upon the chief accountant.

The governor and company of the Bank of England having been served with the writ of distringas, and a notice not to permit the transfer of the stock in such notice and in the affidavit specified, or not to pay the dividends thereon; and having afterwards received a request from the party or parties in whose name or names such stock shall be standing, or some person on his or their behalf, or representing him or them, to allow such transfer or pay such dividends, shall not, by force or in consequence of such distringas, be authorized without the

(*e*) *Re* Marquis of Hertford, 6 Phil. 129.

order of the court to refuse to permit such transfer to be made, or to withhold payment of such dividends for more than eight days after the date of such request (Ord. IV., Nov. 1841).

If either party be desirous of discharging the writ, it is ordered that such writ of distringas, and all process thereunder, may at any time be discharged by the order of the court, to be obtained, as of course, upon the petition of the party on whose behalf the writ was issued, and to be obtained upon the application, by motion on notice or by petition duly served of any other person claiming to be interested in the stock sought to be affected by such writ; and that upon or after such application, such costs thereto and to the said writ as to the court shall seem just, may, if the court shall think fit, be awarded and ordered to be paid by the person or persons who obtained such distringas, or upon any application by any other person or persons (Ord. III., Nov. 1841).

The writ is obtained as of course without applying to the court, and the effect of it is merely to prevent the transfer or payment without due notice to the party obtaining the writ. The bank, on the request of the person in whose name the fund is standing for a transfer of it or for payment of the dividends, serves a notice on the party who put on the *distringas*, and will disregard the writ unless an injunction is obtained within eight days.

CHAPTER IV.

INFANTS.

By the common law the father could not appoint a guardian to his infant heir, because the law had appointed a guardian whether the father was tenant in chivalry or in socage. The 4 & 5 Phil. & Mar. c. 8, was the first law that gave the father a power of appointing the custody of a female child for a special purpose.*

Court of Wards.

It is stated by Blackstone that, when the Court of Wards was abolished, by 12 Car. II. c. 24, the guardianship which was annexed to the king, as lord paramount, under the feudal system, over all his infant tenants, became totally extinguished, but resulted to the king in his Court of Chancery, together with the protection of all other infants within his dominions (*a*).

Care of the crown over infants assigned to the chancellor.

The guardianship which pertained to the crown being taken away, the *care* only of infants and also of their estates belongs to the sovereign, as *parens patriæ*, which care is delegated by him to the Court of Chancery, and

* "Nobody shall take away any maid or woman-child unmarried, being within the age of sixteen years, out or from the possession, custody or governance and against the will of the father of such maid or woman-child, or of such person or persons to whom the father of such maid or woman-child by his last will and testament, or by any other act in his lifetime, hath or shall appoint, assign, bequeath, give or grant the order, keeping, education or governance of such maid or woman-child."

(*a*) Bl. b. iii. 427; Smith *v.* Smith, 3 Atk. Rep. 304.

is confined to that court alone (*b*): since, neither the Exchequer, nor any other court, can assume the right of appointing a guardian, unless it be a guardian *ad litem*, to conduct the defence of the infant, if a suit be commenced against him; which power is incident to the jurisdiction of every court of justice, as also to take care of the property of the infant, whenever his interests are brought before them judicially.

Doubts as to the care of Chancery over infants generally.

Both these above positions have been questioned, and probably with some degree of reason and truth: the one is denied, on the ground that the Court of Wards was established for the purpose of guarding the interests of the lord, and not to abridge or control the legal right of the natural father; the other proposition is also disputed, on the principle that, if the authority over infants resulted to the king as *parens patriæ*, and by him assigned over to the Court of Chancery, then would the court be bound to interfere in the case of the children of the poorest subject in the land; whereas, it never interferes except in questions wherein property is involved, and which require, in the case of a minor, some protection to be thrown around it.

"Every one," says Lord St. Leonards, in Stanton *v.* Percival, Dom. Proc. L. T. v. 26, p. 50, "knows the distinction between an infant and a lunatic. The crown took the estate of the infant under its care. In the case of the lunatic, it was otherwise: the crown did not take the estate, but it took the guardianship of the estate, not for the purpose of adverse possession, but merely for its protection and preservation" (*c*).

(*b*) Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 103.

(*c*) But see further as to the origin of the jurisdiction, Story, Eq. Jur., §§ 1327 *et seq.* After all perhaps there is only one thing certain, viz., that the chancellor, master of the rolls and other judges in chancery have the jurisdiction over the estate and person

CHAP. IV.

Necessary to be made wards of court.

The Court of Chancery would formerly exercise no authority over an infant, unless he was made a ward of court, which is done by merely filing a bill on his behalf, or for the administration of property in which he was interested, or whenever a guardian has been appointed by the court (*d*). But there are instances where the court, upon petition without suit depending, has appointed a guardian and maintenance on behalf of the infant (*e*). And now by 15 & 16 Vict. c. 80, s. 26, upon summary application by summons at chambers—but if maintenance is sought out of a fund paid into court under the Trustee Relief Act, the application must be by petition unless the fund be under 300*l.* (*f*); but if the claim of the infant to maintenance is doubtful, a bill must be filed (*g*); and if the infant be resident out of the jurisdiction, the court will appoint a guardian *ad litem* without a commission (*h*), or a general guardian, if his property is within the control of the court—even though he was born and be

of infants as a part of chancery jurisdiction, but which the court will rarely exercise unless the infant has funds capable of being applied by the court to carry out its orders as to the custody, care and education of the infant or otherwise; Dan. 1211, 1212. But see *Re* Spence, 2 Ph. 247; *Re* Fynn, 2 D. & S. 481, where there was no property. The jurisdiction in the case of lunatics on the other hand belongs to the supreme court in chancery only by special delegation under the sign manual.

(*d*) Amb. 303; Dan. 1210; Story, § 1352. Also where money has been paid into court under Trustee Relief Acts, and an order made for maintenance of infant thereout, she becomes a ward of court. Id.

(*e*) *Ex parte* Kent, 3 Bro. C. C. 87; *Ex parte* Salter, ibid. 500, and see the cases cited; *vide In re* Bond, 11 Jur. 114.

(*f*) Dan. 1212, 1062; *Re* Hodges, 4 De G. M. & G. 491.

(*g*) Dan. 1220, etc.; Fairman *v.* Green, 10 Ves. 45; Corbet *v.* Tottenham, 1 B. & B. 60.

(*h*) Hetherwood *v.* Hetherwood.

domiciled abroad, if the child of British subjects (*i*). The court, it was held, had no jurisdiction to appoint a receiver where no cause was depending (*k*); but now it seems in such case the court usually appoints a guardian of the person and estate, and sometimes a guardian and receiver upon summons (*l*).

Whenever the infant has become a ward of court, all acts affecting his person or estate must be done subject to the sanction of the court (*m*).

Power of the court to control a parent's right over his children.

Notwithstanding the power which a father may claim over his children during their minority, as their natural and legal guardian, yet if from his character and general conduct, the court has reasons to consider him an improper person for the custody of his children, it will order their removal from his contaminating influence, for the sake of morality and general policy. The jurisdiction of the court assumes this paramount authority by reason of its representing the king as *parens patriæ*:—thus, Lord Eldon, in the case of De Mannerville (*n*), states that he once removed a child from his father, who was in the constant habit of drunkenness and blasphemy, poisoning the mind of the infant. The court has also ordered the removal of a man's infant children from his custody, and appointed another guardian, where the father appeared to have exercised gross ill-treatment and cruelty towards his infants (*o*); and in another case, where the father had become insolvent, the court exercised the same control. The Court of Queen's Bench will interfere with paternal rights only in cases of very gross misconduct: comparative

(*i*) Dan. 1213.
(*k*) *Ex parte* Whitfield, 2 Atk. 315.
(*l*) Set. Dec. 705.
(*m*) Story, § 1353.
(*n*) 10 Ves. 61; and see Wellesley *v.* Duke of Beaufort, 2 Russ. 1.
(*o*) Whitfield *v.* Hales, 12 Ves. 492.

CHAP. IV.

destitution is not a sufficient ground (*p*). Cruelty and ill-treatment by a husband against his wife is not reason why he should be deprived of the custody of his infant children. It is only in cases of immorality, and misconduct injurious to the children, that the court will interfere (*q*); and in more recent cases, it has been held that the court has no jurisdiction to remove a child from the custody of its father, on the ground of poverty merely, nor even because it will be for his general welfare that it should be so removed; although gross cruelty, amounting to what the Civilians call *sævitia*, would induce the court to do so. Neither will the peculiar religious opinions of the father operate as a reason for removing a child from his custody (*r*).

Taking a child, being a ward of court, into a foreign country.

But when a father was about to take his child, being a ward in chancery, into a foreign country for the purpose of educating him there, he was restrained from so doing by the court (*s*). Indeed, it is the policy of the court of equity to discountenance as much as possible the removing of infant wards out of its jurisdiction, with a view to their residing permanently abroad, except in a case of imperative necessity; as where it is proved that a constant residence in a warmer climate is absolutely essential to their health: but the court will compel the guardians to bring them within the jurisdiction when required (*t*).

Lord Cottenham's opinions on this subject.

In the case referred to in the margin, the lord chancellor (Cottenham), after adverting to the principle on which the court proceeds, thus expressed himself: "Indepen-

(*p*) *In re* Pulbrook, 11 Jur. 185.

(*q*) *Re* Spence, Infants, 9 Law Times, 241.

(*r*) *In re* Curtis, 7 W. R. 474, per V. C. K.; S. C., 5 Jur., N. S. 1147; 28 L. J., Ch. 458.

(*s*) 10 Ves. 63; Eyre *v.* Countess of Shaftesbury, 2 P. W. 102.

(*t*) Campbell *v.* Mackey, 2 My. & Cr. 31; Stephens *v.* James, 1 My. & K. 627; Wyndham *v.* Ennismore, 1 Keene, 467; Set. 720.

dently of this well-established rule of the court, and the principle upon which it proceeds, I am convinced that scarcely anything can be more injurious to the future prospects of English children, and particularly to English boys, than a permanent residence abroad. Without the proper opportunities of attending the religious service of the church to which they belong, separated from their natural connections, estranged from the members of their own families, withdrawn from those courses of education which their contemporaries are pursuing, and accustomed to habits and manners which are not those of their own country, they must be becoming from day to day less adapted to the position which it is to be wished they should hereafter occupy in their native land."

The application to take the infant out of the jurisdiction may be made by summons supported by an affidavit of the grounds, and there must be an undertaking to bring him back by a specified time or when required (*u*).

Stat. 2 & 3 Vict. c. 54, extending a mother's right of access to her infant children.

The somewhat harsh and unnatural law which, in cases of separation between the parents, denied the mother all access to her children, if the father chose to withhold them from her, underwent a salutary alteration by means of the stat. 2 & 3 Vict. c. 54. Before the passing of this Act, the father alone had the legal power over his children till the age of twenty-one years; but the mother, as such, was only entitled to their reverence and respect (*x*), which right, however, according to some moral writers and common experience, is such as provides but an imperfect obligation (*y*). But under the provisions of the above statute, it is enacted that, after passing of the same, it shall be lawful for the lord chancellor (under

(*u*) Set. 719, 720; Dan. 1218; Lethun *v.* Hall, 7 Sim. 141.
(*x*) Bl. i. 453.
(*y*) Paley, Mor. Phil.

CHAP. IV.

which title (*z*) is included also the vice-chancellor) and the master of the rolls in England, and for the lord chancellor and the master of the rolls in Ireland, respectively, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant, at such times, and subject to such regulations, as he shall deem convenient and just; and if such infant shall be within the age of seven years, to make order that such infant shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just. But the privileges of this statute do not extend to any mother against whom adultery has been established by judgment in an action for criminal conversation at the suit of her husband, or by sentence of an ecclesiastical court. And where the mother had contracted extravagant habits, and was without the means of contributing to the children's support, and had married a second time, concealing that fact from the children's guardian, the court refused an order for the delivery of the children to her, although she had not been guilty of any moral delinquency (*a*).

In any suit for the purpose of obtaining a judicial separation under the 20 & 21 Vict. c. 85, and on any petition for dissolving a marriage, the Court for Divorce and Matrimonial Causes may, from time to time, before final decree (*b*), make such interim orders and such provisions in the final decree as it may deem just and proper, with

(*z*) *In re* Taylor, 10 Sim. 291.

(*a*) Shillito *v.* Collett, 8 Week. Rep. 683; on appeal, 696.

(*b*) And see 22 & 23 Vict. c. 61, s. 4, as to orders after final decree.

respect to the custody, maintenance and education of the children of the marriage, and direct proper proceedings to be taken for placing them under the protection of the court (sect. 35). Under this section of the Act, the court, in dealing with the custody of children, has a discretionary power, exceeding that possessed by courts of common law, and should, in exercising it, make such orders as are just and proper, with reference to the circumstances affecting the suit, taking into consideration the interests of both the children and parents (*c*), and will adhere to or depart from the common-law rule, according to its discretion (*d*). But the Act does not interfere with the legal right of the father to have the custody of his children, where no petition has been presented (*e*).

The jurisdiction of the Court of Chancery with respect to infant wards generally relates to—1, guardianship; 2, maintenance; 3, marriage.

12 Car. II. c. 24, as to *guardianship.*

1. The stat. 12 Car. II. c. 24, gives the father power to dispose of, by testamentary disposition, the guardianship of his children, which may extend, if males, to the age of twenty-one years; if females, to that period or marriage, whichever may first happen: and, under this statute, it has been determined that a father may dispose of the guardianship of such of his children as may *hereafter* be born, including those he may have by a subsequent marriage (*f*).

A father, strictly speaking, cannot appoint a guardian to his *natural* child; but where he nominates persons to be guardians by his will, who consent to undertake the charge, the court will appoint them to be guardians without any reference to chambers (*g*).

(*c*) Marsh *v.* Marsh, 28 L. J., Matr. Cas. 13.
(*d*) Spratt *v.* Spratt, 1 Sw. & Tris. 215.
(*e*) *Ex parte* Young, 4 Week. Rep. 127.
(*f*) 7 Ves. 348.
(*g*) Chatteris *v.* Young, 1 Jac. & W. 106; Ward *v.* St. Paul, 2

CHAP. IV.

A mother cannot appoint a testamentary guardian (*h*), although she may be appointed a guardian; neither is the office of testamentary guardianship assignable, it being a bare power or trust, and therefore will not pass to executors or administrators (*i*).

A stranger may, under some circumstances, appoint a guardian.

Ordinarily a guardian cannot be appointed for a child by a stranger, however much the child may be benefited by him, so as to deprive the parent of the right which naturally belongs to him of being its guardian; but where a stranger leaves a legacy to an infant child, the law will see that he is educated according to his expectations (*k*). Neither can a grandfather appoint guardians to his grandson; but he may give his estate to him on that condition, and the father submitting is bound by it (*l*). And when the considerations are solid, and not merely expectations, as where there has been some immediate irrevocable provision by which the child could be brought up in a manner suitable to its future property, the court will not suffer the father wantonly and capriciously to disappoint the expectations of his child; but the circumstance that a father's consent may be purchased by pecuniary considerations does not break in upon the strictness of the above rule; it merely shows that this paternal right, like any other, may be the subject of contract for a valuable consideration: thus, in the case of Lyons *v.* Blenkin, where a testatrix gave a moiety of an estate to her three infant granddaughters as tenants in common in fee, and appointed her own daughter as the guardian of their fortunes, with a discretionary trust for their maintenance, their father being still living, the court refused an appli-

Bro. C. C. 583; Peckham *v.* Peckham, 2 Cox, 46; 1 Madd. Ch. Pr. 435.

(*h*) Vellareal *v.* Mellish, 2 Swan. 536.

(*i*) Mellish *v.* De Costa, 2 Atk. 14; 1 Madd. Ch. 436.

(*k*) Powell *v.* Cleaver, 2 Bro. C. C. 500.

(*l*) Blake *v.* Leigh, Amb. 306.

cation of the father that his children might be delivered up to him, Lord Eldon saying that, under the circumstances, the testatrix, by the benefits she gave the children out of her property, had purchased the power of educating them in the way and under the control and guardianship which she had pointed out and the parent had *consented* to; his view of the case being that if a testator think fit to provide a fund for the maintenance and education of children during their minorities, and at the end of that period make a further provision for them, and the father permit their maintenance to be supplied from that source, allowing them to be brought up with expectations founded upon a particular species of maintenance and education which he himself cannot afford to give them, he is not, according to the principles of the court, at liberty to say that he will take them from the course of education which they have hitherto pursued, and that too at a period approaching to maturity of age, by applying a more scanty means for the purpose. His Lordship, however, thus refers to the original principle:—"Nobody can doubt that if I give a provision to your child, it does not give me or any one else a right to control your care of her. Not at all: but on the other hand, if when she is young I were to give her a considerable maintenance during her infancy, which you could not have supplied, and a large fortune afterwards, and you, the father, *permit* her to take the advantage of that education, which you could not have afforded but through my gift, could you afterwards stop short, and say that she should no longer have that advantage? Under such circumstances the court would inquire what was most for her benefit" (*m*).

Guardian substituted.

Where a testamentary guardian refuses to act, another guardian may be appointed by presenting a petition (*n*),

(*m*) Jac. Rep. 245.

(*n*) But see *ante*, p. 194, as to making the application by summons.

CHAP. IV.

and it is not necessary to file a bill; but it is otherwise if he has accepted the guardianship or acted therein, and has misconducted himself, for then a bill, and not a petition, must be filed (*o*), unless there be a cause already before the court.

When any dispute arises between guardians as to the management of their ward, the court will interpose and assume the office as guardian-in-chief. And where there are differences as to the education of the ward, parol evidence may be admitted, showing the intention of the deceased father (*p*).

Maintenance of infants.

2. With regard to *maintenance*, it was formerly considered that the father, being bound by nature to support his child, could not claim any allowance out of the infant's property for his maintenance, unless totally incapable, either from poverty or having a numerous family to provide for besides, and was thereby reduced to indigent circumstances; but now it is not necessary to show that the guardian or father is in distressed circumstances (*q*), for if they be not of *ability* to maintain the ward *according to his expectations*, they may claim a suitable allowance to be made for him during his minority (*r*).

The court also in determining whether any and what allowance should be made looks at other circumstances—whether the infant has other sources of income, whether the father has other children dependent upon him who might be injured by the refusal (*s*).

(*o*) O'Keffe *v.* Casey, 1 Sch. & Lef. 106.

(*p*) 1 Madd. Ch. 444.

(*q*) Roach *v.* Garvan, 1 Ves. 160.

(*r*) Buckworth *v.* Buckworth, 1 Cox, 80. But see Set. 711, as to distinction between cases where the father has contracted for the maintenance, as by marriage settlement, or where it is the gift of a stranger in relief of the father, and other cases; and see Ransome *v.* Burgess, 15 W. R. 90, doubting the distinction.

(*s*) White *v.* Grane, 18 Beav. 571; Buckworth *v.* B., 1 Cox, 80; Jervoise *v.* Silk, Coop. 52.

An allowance for maintenance to a guardian must be in relation to that which the infant is then entitled to, and not in regard to what falls in afterwards (*t*).

Where the father is dead or unable to maintain the infant suitably, the court will allow maintenance if the principal and the interest of a legacy to a child is vested, although there be a direction that the interest shall accumulate till a legatee attain his age of twenty-one years (*u*). And even where the interest is not vested, yet if it be given by a father or person *in loco parentis* (*v*); or if, under an accumulation clause, the children have as among themselves an equal chance to take the capital with the accumulation, or if the consent of all persons interested in remainder be given, the court may order maintenance (*x*). But when, in the event of the death of a child under the age of twenty-one leaving issue, the accumulated property would have gone to the issue, Lord Eldon expressed it as his decided opinion that maintenance could not be allowed to that child (*y*).

Settlements, however, usually contain maintenance clauses, though the interests be contingent on attaining majority; and now, by the Trustees and Mortgagees Act, 23 & 24 Vict. c. 145, s. 26, trustees are empowered to apply the whole or any part of the income or accumulations of income of any property held in trust for an infant either absolutely or contingently on his attaining twenty-one, or on the occurrence of any event previously to his attaining that age, towards the maintenance or education of such infant, whether there be any

(*t*) Chaplin *v.* Chaplin, 3 P. Wms. 368.
(*u*) Stretch *v.* Watkins, 1 Madd. 253.
(*v*) Rop. Leg. by W. 1257.
(*x*) Set. 704.
(*y*) Errat *v.* Barlow, 14 Ves. 203; Cavendish *v.* Mercer, 5 Ves. 195, n.

CHAP. IV.

other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not. These powers may however be negatived by express declaration (sect. 32). And the Act only applies to instruments executed or confirmed after 28th August, 1860.

Wherever maintenance is allowed, it is always to be paid to the father out of the child's estate, and was never known to be deducted out of a legacy left by the father to his child (*z*).

In some cases the court has ordered part of the capital to be applied for maintenance (*a*). The above statute does not refer to advancement. The application for maintenance, if made under 11 Geo. 4 & 1 Will. 4, c. 65, as to stock standing in the name of an infant, should be by petition; if under the Legacy Duty Acts, 36 Geo. 3, c. 52, s. 32, and 37 Geo. 3, c. 135, may be made by petition or motion; or if under Trustee Relief Acts, by petition, unless in these two latter cases the fund be under 300*l.*, when it may be made by summons. In other cases it may be obtained on summons (*b*). Where the father is dead or unable to maintain the infant, the court has ordered maintenance, even though the infant be not a ward and be out of the jurisdiction (*c*).

Marriage of infants.

3. *Marriages of infants.* The marriage of an infant ward, without the consent of the guardians, is called a *ravishment of the ward*, and is punishable by stat. West. 2, c. 35; "for after such ravishment by marriage the

(*z*) Jeffreys *v.* Jeffreys, 3 Atk. 123; 1 Madd. Ch. 447.
(*a*) Set. 704; Walker *v.* Wetherell, 6 Ves. 474.
(*b*) Set. 721, 722; Cons. O. 35, r. 1.
(*c*) Story, § 1354 b.

ward (*d*) cannot be restored to such condition as he was in before.

When an infant is a ward in Chancery, the consent of the court must be obtained upon a treaty of marriage, and the court will generally order a reference to chambers, to ascertain whether the settlement proposed be a fit one; and if the court be not satisfied therewith, it will not allow the marriage to take place: for although equality of portion and fortune between the ward and the person seeking her in marriage be not the material ingredient in the happiness of married life, yet the court in this respect acts by way of analogy to the anxiety and prudence of the natural parent, who always takes care that such provision shall be made as will enable infants to live in the world suitable to that rank to which their birth entitles them (*e*). Where terms for the settlement of property of an infant female ward have been approved of in chambers, it is not competent to the intended husband and wife, by delaying the marriage till after the wife has attained her majority and entered into fresh settlements, to defeat the settlement of the court (*f*).

Caution observed by the court as to the marriage of a ward in Chancery.

If a female ward in Chancery be desirous of marrying, the court will look very anxiously into the circumstances and fortune of the intended husband: if he be of similar rank and fortune to the ward, attention will be paid to such circumstances; but if he prove to be a mere fortune-hunter, having no property of his own, the court will not allow him to touch any of her wealth (*g*); although it is the usual custom of the court, for the purpose of securing the happiness of the lady, and ensuring the good conduct

(*d*) Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 103, per Jekyll, L. Com.

(*e*) Smith *v.* Smith, 3 Atk. 305.

(*f*) 2 Coll. C. C. 412; 10 Jur. Dig. 98.

(*g*) Ball *v.* Coutts, 1 Ves. & Bea. 297.

CHAP. IV.

of the husband, to empower her, under the marriage settlement, to give one-fifth of her property to her husband, by will. But when a ward of the court, having married without consent, *died*, pending a reference to the master for a settlement of her property, leaving one child, the husband, who was guilty of contempt in marrying her, having petitioned for part of her fortune, his application was dismissed with costs (*h*).

In an old case—*Bagnal contra Langton*, Mich. T., 9 Jac. 1—a man stole his wife against her friends' consent and sued them for her portion in this court—but was refused relief on the ground, as it was quaintly stated by Sir Thomas Egerton, that "he who steals flesh let him provide bread how he can."

Contempt in marrying a ward of court.

Marrying an infant ward of the court, without consent, is a high contempt; and all persons concerned in the contrivance of it, knowing it to be such, are punishable for the contempt (*i*): and, on the petition of the guardian, all the parties will be ordered to attend, and the husband will be committed, and forbidden to receive the visits of his wife, until the execution of a settlement approved of in chambers, when the husband may present his petition to be discharged. And it seems that marrying an infant ward of the court is a contempt, although neither the husband nor any of the parties concerned had any notice that the infant was a ward of court; but such contempt will be considered as criminal or merely technical, according to the conduct of the parties concerned and the circumstances of the case (*k*).* If there exist any ground

(*h*) Dean *v.* Long, Rolls, Nov. 24, 1836; see Biddle *v.* Jackson, 26 Beav. 282.

(*i*) Moore *v.* Moore, 2 Atk. 157.

(*k*) Martin *v.* Forster, 25 Law Times, 5; 7 De G., M. & G. 98; Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 103.

* This may have arisen from the ancient practice of requiring

of suspicion of a ward in court being about to make an improper marriage, and there is an affidavit of such intended marriage, the chancellor will grant an injunction generally, to restrain all communication with the infant, by letter or otherwise (*l*). Where an infant defendant had married without obtaining the consent of the court. certain funds in court, standing in her name, were ordered to be paid to her husband with her consent, no settlement having been made (*m*).

Male and female wards in Chancery.

A lady being entitled to property upon attaining twenty-one, or marriage, married under age: it was held that even this contingent interest in property was sufficient to entitle her to be made a ward of court, and that her mother might present a petition for a settlement (*n*). But the court has no jurisdiction to compel a male ward, with whom a marriage has been solemnized without its consent, on attaining his full age, to execute a settlement of his estate, so as to exclude his wife from all participation in the property (*o*). By the 18 & 19 Vict. c. 43, infants may, with the sanction of the Court of Chancery, make valid and binding settlements or contracts for a settlement of their real or personal estate in contemplation of marriage, which shall be as valid and effectual as if the persons executing were of full age. But the Act does not apply

the committee to whom an infant ward had been intrusted to give a recognizance that the infant should not marry without the sanction of the court, which in strictness became forfeited, though without the privity or knowledge or neglect of the committee, whatever favour the court upon application might think fit to show to the committee under such circumstances. (Per Sir J. Jekyll in Eyre *v.* Countess of Shaftesbury.)

(*l*) 1 Madd. Ch. 453.

(*m*) Bennett *v.* Biddles, 10 Jur. 334.

(*n*) Russell *v.* Nicholls, 16 L. Journ., N. S., Ch. 47.

(*o*) *In re* Murray, 3 Dru. & W. 83.

CHAP. IV.

to male infants under twenty or females under seventeen years of age.

By another Act, 19 & 20 Vict. c. 120, s. 36, for facilitating leases and sales of real estates, all powers given by that Act to the Court of Chancery, and all applications under the same and consents to such applications, may be exercised, made or given by guardians on behalf of infants (*p*). And see 4 Geo. 4, c. 76, as to marriages of minors without the consent of parents or guardians, and giving the Chancery power in case of the father's being insane or the mother or guardian being insane or beyond seas, to certify the same, and as to the settlement by the the court of the estates of female infants married without consent (*q*).

As infants are favourites of the Court of Chancery, they cannot be bound by any settlement but what is fair and reasonable (*r*).

By these statutes, 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, orders may be made for the transfer of estates or stock vested in infants as *trustees* or *mortgagees*.

2 & 3 Vict. c. 60.

Also a power is given to the court to make mortgages and sales of settled estates for the payment of debts and to enforce conveyances by infants, under the 2 & 3 Vict. c. 60, intituled "An Act to explain and extend the provisions of an Act passed in the first year of his late Majesty, King William IV., intituled 'An Act for consolidating and amending the laws for facilitating the payment of debts out of real estates.'"

(*p*) L. R., 1 Ch. 292.
(*q*) See Set. 733.
(*r*) Williams *v.* Williams, 1 Bro. C. C.

CHAPTER V.

MARRIED WOMEN.

Common Law Rights as to Property—Separate Use in Equity—Restraint on Alienation—Equity to a Settlement.

Husband's common law rights to his wife's property.

By the common law the husband becomes entitled by marriage to the chattels personal in possession of his wife, and also to the income of her choses in action and her chattels real, with the right of reducing, during his life, the choses in action into possession and of aliening her chattels real by act *inter vivos* (though not by will). In default of his exercising these rights over the choses in action and chattels real, they remain with the wife if she survive him, but belong absolutely to him should he survive her. He is also entitled to the rents of her freeholds during their joint lives; and if he has a child by her who might inherit the realty, and if he survive her, he is also entitled to an estate by the curtesy during his life. These interests and rights he has subject to and because of his common law obligation to support his wife and family. But this common law obligation only extends to bare necessaries; and there are very imperfect means of enforcing it even to that extent: whilst, moreover, the extravagance or misfortunes of the husband may strip him of his property, including that which he has received with his wife, and render it impossible for the courts to protect her.

The Court of Chancery, however, long since emancipated itself from the common law view that the husband and wife are as respects property one person, and that her identity is merged in his: though it was not able to ignore his common law duty of supporting his wife and

CHAP. V.

family, and to set aside in all cases his consequent right to some share in and control over her property.

Still it would never presume directly to overrule the law, but when the property and rights of the parties were properly brought before it for its administration it took care that the husband should not get at the property through its intervention without doing equity. Subsequently it has advanced a stage, and in some respects recognized as capable of direct enforcement in the court these rights of the wife.

The trust for the separate use of the wife is a creature of equity, devised and permitted under the above principles. If property, real or personal, is settled in the hands of trustees upon trust for the separate use of the wife, free from the control or debts of her husband, she is treated by the court as a *feme sole* as to such property, with absolute independent power of enjoyment and disposal, so that her husband's acts cannot affect it or charge it. As to personal property this has been long settled (*a*).

But as to real estate, it seems to have been doubtful whether the separate use affected more than the interest in it during her life; but it is now clear that if the fee is settled to her separate use, her husband is excluded from the curtesy (*b*); and she can alien or deal with the equitable interest in the fee and disinherit or bind her heir by any means a *feme sole* could (*c*).

The general engagements, however, of a married woman will not bind her separate estate. Though a

(*a*) Fettiplace *v.* Gorges, 1 Ves. jun. 46; Rich *v.* Cockell, 9 Ves. 369; Wagstaff *v.* Smith, 9 Ves. 520; Sturgis *v.* Coap, 13 Ves. 190.

(*b*) Peacock *v.* Monk, 2 Ves. sen. 190; Moore *v.* Webster, 15 W. R. 167.

(*c*) Taylor *v.* Meads, 13 W. R. 394 (overruling Lechmere *v.* Brotheridge, 11 W. R. 814); Hall *v.* Waterhouse, 13 W. R. 633.

feme sole as respects the property she is not such for all purposes, and so her common law disability to bind herself personally by general engagements or debts, and through her person this property remains. The engagements to be effective against the separate estate must be made in writing or with direct reference to such estate. She has no power to contract a debt so as to bind herself; and the solemnity of securing a debt by writing is, therefore, held to have no meaning, unless it is taken to imply a reference to her separate estate which she can bind. And if the property be real estate the engagement must be in writing in order to satisfy the Statute of Frauds (*d*).

It was once deemed necessary that the property should be vested in trustees for the benefit of the wife (*e*); but now it is settled, that, though the husband has actually got possession, no such trustees being interposed, the court will actively interpose and make him a trustee for her in spite of his legal rights and of his being under no necessity to come to the court for its assistance (*f*).

It having been thus established that in a court of equity a married woman might be regarded as a *feme sole* in respect to property settled to her separate use, it followed as an inevitable consequence that she might deal with it as she pleased, or too often rather as it suited her husband's pleasure; and thus, through marital influence or intimidation, that very benefit it was the object of the settlement to secure to her might be entirely frustrated. And a case having occurred (Pybus *v.* Smith, 3 Bro.

(*d*) Shattock *v.* Shattock, L. R., 2 Eq. 182; 35 Beav.; and see *Re* Leeds Banking Company, L. R., 3 Eq. 781; 36 L. J., Ch., N. S. 90; Butler *v.* Cumpston, L. R., 7 Eq. 16; 38 L. J., Ch., N. S. 35; Mr. Henry Davies, L. R., 10 Eq. 88.

(*e*) Hulme *v.* Tennant, 1 Bro. C. C. 16.

(*f*) Bennet *v.* Davis, 2 P. Wms. 316; Newlands *v.* Painter, 10 Sim. 377; 4 M. & Cr. 408.

CHAP. V.

C. C. 339), wherein a married lady upon whom property had thus been settled joined her husband in conveying the whole of it away as a security for his debts, which transaction the court was compelled to give effect to, such an improvident exercise of her power so wrought upon the mind of Lord Thurlow that he struggled hard to induce the lady to exercise her right with a more reasonable regard to her own interests than at first she seemed inclined to do; but his lordship was obliged, although with great reluctance, to submit, and withdrew the protection of the court. The fact was, Lord Thurlow felt himself bound by the rules of the court as they then existed, and also by the authorities (per Lord Eldon, 9 Ves. 493-4, and 11 Ves. 222), there not having been at that time such a thing known as a clause of restraint upon the alienation of a wife's separate property by anticipation. To remedy this evil for the future, Lord Thurlow suggested the introduction of words positively restrictive of any such sweeping alienation, and for the first time tried the experiment of defeating what he took to be established by the authority of the court. This he did by procuring the insertion of the words "and not by anticipation," which novel and ingenious remedy Lord Thurlow had an opportunity of testing for the first time by their insertion in Miss Watson's settlement, of which he himself was trustee; and these few words, when introduced in a settlement of the wife's property as a modification of her power of alienation, have proved a valid safeguard ever since (vide Parkes *v.* White, 11 Ves. 222), and the prevention of much matrimonial discord; for when once it became established that by force of this salutary check the wife's settled property was no longer subject to her own control during the coverture, all fear or apprehension of marital influence or marital tyranny, operating in contravention of the enjoyment of the property, ceased; for

the corpus of the fund, or the estate itself remaining intact, both baron and feme were left, in spite of themselves, to the full enjoyment of the annual income arising therefrom during their joint lives, whilst those domestic dissensions and connubial controversies, which might otherwise have arisen in reference to the separate estate, were suffered to find vent in other channels. And from this time a new practice for the better protection of married women in respect to their separate property was introduced, there being now scarcely any well-drawn settlement or will, giving property to the separate use of a married woman, unaccompanied by the clause against anticipation. She may now receive or at her own good pleasure deal with the income when it has arisen, but not otherwise (*g*).

Restraints on alienation being annexed only to the separate estate of a feme covert are inconsistent with the ownership, and are not allowed to be imposed in the case of a man or a single woman.

History of separate use and clause against anticipation.

"When this court first established the separate estate it violated the laws of property as between husband and wife; but it was thought beneficial and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to the new estate; and it was found as part of such law, that the power of alienation belonged to the wife and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property supported the validity of the prohibition against alienation" (*h*).

The separate use is expressed to be generally during coverture or independent of any future husband, and will,

(*g*) Tullett *v.* Armstrong, 1 Beav. 1; 4 My. & Cr. 337, 405.
(*h*) 4 My. & Cr. 405, per Lord Cottenham.

CHAP. V.

unless otherwise settled in the interval, attach on every subsequent coverture, and with it the restraint on anticipation, if any. But during widowhood the woman has absolute power of disposition free from the restraint, and may if she likes, on a subsequent marriage, settle the property on any new trusts (*i*).

The income already accrued of the separate estate, whether in cash or invested, belongs to the woman as separate estate, and she can dispose of it by will or act *inter vivos* (*k*). But if she does not dispose of it, it belongs on her death to her husband in his marital right (*l*). And if she allows him to receive the income, or it is paid to him or into his account with her consent, she cannot afterwards claim it, at least if she be living with him at the time, as it is considered to be allowed by her for the benefit of the family (*m*).

If there is an agreement between husband and wife that she shall carry on a trade for her own benefit, the profits of the business will belong to her for her separate use, and will be protected against her husband in equity (*n*).

20 & 21 Vict. c. 85, and 21 & 22 Vict. c. 108.

By the 20 & 21 Vict. c. 85, ss. 21, 26, and 21 & 22 Vict. c. 108, s. 6, a married woman deserted by her husband may apply for an order of protection against him and his creditors of the property which she has or may acquire by her industry or otherwise during such desertion, and she will then be in respect of such property a

(*i*) Tullett *v.* Armstrong, 1 Beav. 1; 4 My. & Cr. 377.

(*k*) See Humphrey *v.* Richards, 4 W. R. 432; Butler *v.* Compston, L. R., 7 Eq. 16.

(*l*) Malony *v.* Kennedy, 10 Sim. 254; Johnstone *v.* Lumb, 15 Sim. 308; Tugman *v.* Hopkins, 4 Man. & Gr. 389.

(*m*) Caton *v.* Ridout, 1 Mac. & G. 603; and see 26 Beav. 5, n.; Rowley *v.* Unwin, 2 K. & J. 142.

(*n*) Story, § 1385—1387.

feme sole, and be capable of making contracts, and of suing and being sued; and if the parties come together again the property will be held to her separate use. But in equity, and independently of these statutes, the right of a wife deserted by her husband to the earnings made in any trade she may have been able to carry on will be protected (*o*).

The Court of Chancery also sometimes interposes to protect the interests of the wife and her children, even when there has been no settlement or anything equivalent to the sanction of the husband to her separate use. This is where property devolves upon her during marriage and the court obtains the control of it. It will then force the husband to do equity, by causing a sufficient portion to be settled for the separate use of the wife and the benefit of her children. The wife has the right and not her children to claim this settlement. It is called *her* equity to a settlement. It first arose, according to Lord Northington, upon the husband's coming into the Court of Chancery for assistance (*p*).

Wife's equity to a settlement.

So that whenever the wife's property is in its nature legal, and can be attained by the husband or his assignee at law, equity, following the law, will not interfere with the marital rights; yet should any events occur that the property, not already the subject of a settlement, is, by means of collateral or other circumstances, brought under the jurisdiction of the court, whose aid is sought, either by the husband or his assignees, to obtain possession of the fund, and there has been no adequate provision made on her behalf in lieu of the fund, the court, proceeding on the maxim that he who seeks equity must do equity, will refuse its interposition until a just settlement is

(*o*) Story, § 1387.

(*p*) Scriven *v.* Tapley, 2 Eden, 337.

CHAP. V.

secured to the wife. This is considered the price or consideration which the court interposes for its assistance (*q*).

It is also settled that, notwithstanding the supposed origin of the right, it had become so well recognized and established that the wife might be allowed to come into equity as a plaintiff to enforce it (*r*).

The wife can claim her equity out of any property real or personal which devolves upon her, and whether absolutely or for life (*s*); at least, if in the latter case her husband deserts or refuses or becomes incapable of maintaining her (*t*).

Though the wife's equity is personal to herself, so that she alone can claim it, it is yet allowed in part as a benefit for her children which she is interested in securing, and accordingly it is not given generally unless there be something more than a life interest, the settlement of which would only enure to the wife's benefit.

And it seems her equity is binding against her husband's particular assigns for value as well as his assignees in bankruptcy (*u*).

If the wife, however, have only a life interest or be tenant in tail, the assignees in bankruptcy are only entitled subject to the wife's equity, as they take only the

(*q*) Duncombe *v.* Greenacre, 30 L. J., N. S., Ch. 413; 28 Beav. 472; aff. on app. 2 De G., F. & J. 509; Life Association of Scotland *v.* Liddell, 3 De G., F. & J. 271; Sturgis *v.* Champneys, 5 My. & Cr. 97.

(*r*) Sturgis *v.* Champneys, 5 My. & Cr. 105; Eedes *v.* Champneys, 11 Sim. 569; Hanson *v.* Keating, 4 Ha. 6; Newenham *v.* Pemberton, 11 Jur. 1071.

(*s*) Sturgis *v.* Champneys, 5 My. & Cr. 97; Freeman *v.* Fairlie, 11 Jur. 447; Hanson *v.* Keating, 4 Ha. 1; Lumb *v.* Milnes, 5 Ves. 517.

(*t*) Tidd *v.* Lister, 10 Ha. 152, 154.

(*u*) Sturgis *v.* Champneys, 5 My. & Cr. 97; Macaulay *v.* Phillips, 4 Ves. 19; Scott *v.* Spashett, 3 Mac. & G. 599.

husband's rights; but a purchaser for value, without notice of the wife's equity having arisen by reason of the husband's desertion or neglect to support her, has a prior claim (*x*).

But in such case, and if the husband have deserted or refused to maintain her, the court may order her a separate maintenance out of any equitable property of his (*y*).

As to the amount which will be settled, this depends on the circumstances of the case, such as the previous amount of the wife's property already received by the husband or any prior settlement and the conduct of the parties. Sometimes one-half, sometimes three-fourths, and, under special circumstances (including generally desertion by the husband), the whole has been settled (*z*).

The equity to the settlement being personal to the wife, though for the benefit of the children also, she may at any time before the final order, even though after the decree and the terms of the settlement have been referred to chambers and approved of, waive her right to it (*a*); and she may lose it by her misconduct (*b*).

We have seen that a court of equity will recognize a married woman's right to make arrangements, even with her husband, without the intervention of a trustee as regards her separate estate; and it will do so also in

(*x*) Life Association of Scotland *v.* Liddell; Cooper *v.* Greene, 3 De G., F. & J. 271; Re Duffy's Trusts, 28 Beav. 386; Tidd *v.* Lister, 29 Beav. 618; 10 Ha. 152, 154.

(*y*) Story, § 1424.

(*z*) Set. 668. See Re Suggitt's Trusts, 37 L. J., Ch. N. S. 426 (1868), as to circumstances where the whole fund will be settled; Gardner *v.* Marshall, 14 Sim. 575; Law T., vol. 5, 233; and Duncombe *v.* Greenacre, 29 Beav. 678. And see Re Grove's Trusts, 3 Gif. 575, fund being small the whole settled.

(*a*) Barrow *v.* Barrow, 4 K. & J. 409; 18 Beav. 529.

(*b*) Story, § 1419.

CHAP. V.

respect to any matter wherein she is in the position of a *feme sole* (*c*).

Thus where she is suing for a divorce she may enter into an agreement with her husband for a compromise, and this agreement will be supported, provided it do not contain stipulations which the court cannot enforce.

Statutory right to separate estate when not deserted.

Unlike the statutes above noticed, "The Married Women's Property Act" (33 & 34 Vict. c. 93) applies even though the wife be not deserted. It provides that her earnings and wages, gained after the passing of the Act (9th August, 1870), "shall be deemed to be property settled to her separate use," as also her deposits in savings banks made after the same time and not with her husband's moneys without his consent; and that moneys in the public funds, shares, &c. to which a liability is attached, in public companies and benefit societies, &c., to which moneys and shares any woman married or about so to become *may be entitled* or about to acquire and not made or obtained with her *husband's money* without his consent, may, at her request, be placed in her name or intended name to her separate use, and shall be "deemed to be her separate property," as though she were unmarried. And also that as to any woman married after the passing of the Act, and subject to any trusts affecting the property, if she become entitled during marriage to any personalty as *next of kin*, or to any sum not exceeding 200*l.* by *deed or will*, the same is to "belong to her for her separate use;" and if any freeholds or copyholds *descend* (*d*) to her as heiress during the same time the "rents and profits shall belong to her for her separate use" (*e*).

(*c*) Anderson *v.* Abbott, 23 Beav. 457; Vansittart *v.* Abbott, 27 L. J. C. 222; 4 K. & J. 62; Walrond *v.* Abbott, 1 Johns. 18.

(*d*) It seems not to apply to real estate otherwise acquired.

(*e*) It is not said "for life."

The Court of Chancery or the county court judge (who has now equitable jurisdiction) is by the Act to settle disputes as to such property. There are provisions enabling a married woman to insure her own or her husband's life for her separate use, and the husband to insure his own life for the benefit of the separate use of his wife or of his children or both, and for the appointment of trustees of the insurance moneys when payable by the Court of Chancery or county court. She is empowered to sue in her own name, with the like remedies civil and criminal in respect of and for the protection of her separate property under the Act, and also of any property which she had before marriage, and which had been agreed by her husband in writing to become her separate property after marriage, as if unmarried. The wife's creditors before marriage are to have no remedy against the husband but only against her, and her separate property is to be liable. She is also liable to the parish for the maintenance of her husband and children out of her separate property.

This Act, it will be seen, makes most sweeping changes in the relation of husband and wife as to property and duties. The wording is peculiar and deserves to be closely scrutinized. The meaning and precise effects only a cloud of decisions can unfold.

CHAPTER VI.

SPECIFIC PERFORMANCE OF AGREEMENTS.

Grounds of jurisdiction.

THE object of a court of equity in decreeing a specific performance of agreements, which are founded on *bonâ fide* considerations, is for the sake of giving the party seeking redress a more perfect remedy than was allowed him in a court of common law, in which he could only recover damages for a breach of the contract, without being able to enforce its completion: and this branch of the chancellor's equitable jurisdiction is by Lord Hardwicke said to be the most useful one; for a court of equity interferes on this ground, namely, that the party who has entered into a covenant is, in conscience, bound, not only to make compensation for the breach, where he is unable to perform it, but also actually to perform it when it shall be in his power (*a*). This, however, extends only to such contracts, the specific performance of which is essential to justice, and where the legal remedy is *defective* (*b*). Thus, in a contract respecting land there may have been many reasons inducing the purchaser to enter into the contract for which damages at law would be no sufficient compensation—for example the purchaser might have bought that identical land for some specific purpose either on account of its neighbourhood and its surroundings, or for the sake of its own

Only where legal remedy is defective.

(*a*) Alley *v.* Deschamps, 13 Ves. 228.
(*b*) Webb *v.* England, 29 Beav. 44.

peculiar properties—as the erection of a water-mill or the digging brick earth, and the like (*c*). But if damages for a breach of the covenant be all that justice can require, as in the case of a contract for the purchase or transfer of stock in the public funds, equity will not interpose (*d*).

But the sale of an annuity payable out of dividends of a particular stock, or of the right to a dividend upon a bankrupt's estate, or even a contract for stock, where the object is to obtain delivery of certificates which confer the legal title to it, may be enforced in equity (*e*).

Specific performance not decreed where there is no legal competency.

When a party is called upon to do an act which he is not lawfully competent to perform, equity will not enforce the agreement, for that would expose him to another action for damages at the suit of the person injured by such act; therefore, if a bill be filed for the specific performance of an agreement made by a man who appears to have a bad title, he is not compelled to execute it unless the party seeking performance be willing to accept of such a title as he can give, and that only where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give: "The reason," said Lord Redesdale, "among others, I take to be this,—not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person" (*f*). And thus a contract for sale, by trustees not being authorized to sell, will not be enforced against them (*g*).

(*c*) Story, §§ 715 *et seq.*, 739.

(*d*) Mitf. Tr. Pl. 118, 119.

(*e*) Sug. V. & P.; Clifford *v.* Turrell, 14 Law Jour. N. S., Ch. 390; and see Falcke *v.* Gray, 4 Drew. 651; Dowling *v.* Benjamann, 2 Johns. & Hem. 544.

(*f*) Harnett *v.* Yielding, 2 Sch. & Lefr. 554.

(*g*) Sug. V. & P. 14th ed. 216.

CHAP. VI.

Where also, from the circumstances, it is doubtful whether the party meant to contract to the extent that he is sought to be charged, this is another ground in which courts of equity refused to enforce specific execution of agreements (*h*).

Where vendor has no title.

If a *bonâ fide* vendor has no title to the estate which forms the subject of contract, the court will leave the purchaser to his remedy upon the articles at law, where, generally speaking, he would obtain nominal damages (*i*). It is not necessary that a vendor should have the legal estate, to enable the court to decree a specific performance; it is sufficient if he have an equitable title: but he must get in the legal estate before the conveyance is settled (*k*).

Part of a contract enforcible though not the whole.

If, however, a party enter into a contract to sell an estate, and it turns out that he is unable to complete his contract, but is nevertheless able to perform a part of it, the court will compel him, if the purchaser choose, to execute as much of the contract as he is able; for, generally, a purchaser is at liberty to take what he can get out of the bargain, with compensation for what he cannot have, provided a deficiency can be accurately ascertained and the compensation estimated, unless the performance would be unreasonable, and prejudicial to persons interested in the property, but who are not parties to the contract (*l*).

Penalty for non-performance.

Sometimes, in a written agreement, there is a penalty inserted in the event of non-performance; but this does not give a party the option of paying the penalty, and so relieve himself from the performance of the agreement: thus, where in articles for the purchase of an estate, there

(*h*) Harnett *v.* Yielding, 2 Sch. & Lefr. 554.

(*i*) Sug. V. & P.

(*k*) Averne *v.* Browne, 14 Law Jour., N. S. 30; 1 Verulam, Real Prop. Rep. 162; Sug. V. & P. 14th ed. 353.

(*l*) Thomas *v.* Dering, 1 Ke. 743; Sug. V. & P. 14th ed. 308 *et seq.*

was a provision that if either broke the condition, he should pay 100*l.* to the other, on forfeiture by one of them, Lord Hardwicke decreed a specific performance (*m*).

Specific performance decreed between persons claiming under the original parties.

Where the specific execution of an agreement respecting real estates would have been decreed between the parties, it will be decreed between all persons claiming under them in privity of estate, representation or title, unless controlled by intervening equities (*n*). And should the heir of the purchaser file his bill for a specific performance, he may, in general, require the personal representatives of the purchaser to pay the purchase-money out of his personal estate in their hands (*o*).

Party wishing to enforce an agreement must do what he can on his own part.

If, after an agreement for the sale of an estate, either of the parties wish, by proceedings at law, to compel the other to observe the contract, he must make his own part of the agreement precedent; for he cannot take proceedings against the other without an actual performance of the agreement on his part, or a tender and refusal. Thus, the vendor cannot bring an action for the purchase-money without having executed the conveyance, or offered to do so; on the other hand, the vendee cannot maintain his action for a breach of covenant, without having tendered a conveyance and the purchase-money, unless, indeed, a bad title be produced; for, in that case, the purchaser may maintain an action for recovery of his deposit, without tendering his conveyance (*p*).

In equity the plaintiff filing a bill for a specific performance of an agreement must show that he has performed, or been ready and willing to perform, all *essential* terms of the agreement up to that time, and his

(*m*) Howard *v.* Hopkins, 2 Atk. 371.
(*n*) Story, § 788.
(*o*) Story, § 790.
(*p*) Sug. V. & P. 14th ed. 240, 241.

CHAP. VI.

readiness and ability to carry it out for the future. The plaintiff is not held, as at law, to the strict tender or *technical* execution of all conditions precedent (*q*).

But the court affords him relief in part on this very ground of the technical rigour of the courts of law in requiring the performance of conditions and the proof thereof, provided the contract can still substantially and with fairness to defendant be executed by plaintiff, and he is able and willing so to do (*r*).

Where strict terms of a contract do not affect the essence.

Slight mis-description.

Where through inadvertency or negligence the terms of a contract have not been complied with in particulars which do not materially affect the essence of the agreement, or where the mis-description of the property has been slight, equity will, nevertheless, decree the performance in specie in favour of the party chargeable with the non-compliance or mis-description, provided compensation can be made for any injury that may have arisen by such non-compliance or mis-description of the property (*s*).

Specific performance not enforced where contrary to public policy.

A court of equity will not enforce contracts or assignments which are contrary to public policy, and thus it will not allow an officer in the army or navy or any other government officer to anticipate his future pay connected with the right of the government to his future services—because it is deemed contrary to the honour, dignity and interest of the state that its servants should be allowed to embarrass themselves by assigning away those resources which were intended to place them in a condition of comfort and efficiency (*t*).

Nor where maintenance and champerty are involved.

Upon the same principles of public policy, equity refuses to sanction assignments which involve maintenance or champerty, both being hostile to public justice and

(*q*) Fry, Spec. Perf. 270 *et seq.*
(*r*) Story, Eq. Jur. §§ 736, 747—750.
(*s*) Story, §§ 747, 748, 771—777.
(*t*) 2 Spen. 867; Story, §§ 769, 1040 f.

abhorred by our law. The former is discouraged as an officious intermeddling in a suit that no way belongs to one, and tends to keep alive strife and contention. The latter, champerty (*campi partitio*), is a species of maintenance and punished in the same (*u*) manner, viz., at the common law by fine and imprisonment, and by stat. 32 Hen. 8, c. 9, by a forfeiture of 10*l*. This offence is a bargain with a plaintiff or defendant to divide the land, *campum partire*, or other matter sued for between them, if they prevail at law. Whereupon the champerter is to carry on the party's suit at his own expense. But in the case of a parent and child, or of an heir apparent, or of the husband of an heiress, or of a master and servant, such contracts made by them are excepted from the rules against champerty (*v*).

Nudum pactum; what.

It may be well to observe that a contract which involves no consideration is called a *nudum pactum*, or a mere naked promise, *ex quo non oritur actio;* and it is immaterial whether it be in writing or not. Our law recognizes no distinction between a written contract and a verbal agreement. There is therefore no intermediate order of contracts known as contracts in *writing;* for, by the English law, all contracts are divided into agreements by *specialty* and agreements by *parol*. If they be not specialties, viz., contracts under seal, they belong to the other class of contracts, denominated parol, whether reduced into writing or not, and require proof of consideration to enforce their performance; so that, where the term "written agreement" merely occurs, as it often does, it is only to be understood as a parol agreement, reduced into writing for the sake of greater proof of the intention of the parties,

As to specialty and parol agreements.

(*u*) Bl. Com. vol. 4, p. 135; Reynell *v.* Sprye, 1 De G., M. & G. 660.

(*v*) 2 Spen. 870, 871; Story, § 1049.

or for satisfying the Statute of Frauds, or the statute 9 Geo. IV. c. 14, commonly called "Lord Tenterden's Act."

The contract must be made according to the forms prescribed by law.

These forms depend upon the statute 29 Car. II. c. 3, s. 4, usually denominated the Statute of Frauds; which provides, among other things, that no action shall be brought, whereby to charge any person upon any agreement made upon any consideration of marriage, or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, be in *writing, and signed by the party* to be charged therewith, or some other person thereunto by him lawfully authorized. By a liberal interpretation of this clause of the statute, a letter containing the terms of the agreement, the consideration, and the subject-matter of contract, or referring to any writing containing them, even though the writer did not intend to bind himself, has been held sufficient (*x*) (*y*); but the court will not enforce the specific performance, unless a fair inference may be deduced from the letter, that it imports a *concluded* agreement (*z*).

The agreement or memorandum need only be signed by the party to be charged; and, therefore, an offer signed by one party, if accepted by word of mouth or by acts *in pais*, may make a concluded agreement if the acceptance be unconditional and unambiguous. And if the terms have been already agreed in negotiations between the

(*x*) Kennedy *v.* Lee, 3 Meriv. 441.

(*y*) Peckham *v.* Taylor, 31 Beav. 250.

(*z*) 1 Madd. Ch. 482; Huddlestone *v.* Briscoe, 11 Ves. 591; Stratford *v.* Bosworth, 2 Ves. & Bea. 346.

Maxim—"He who seeks equit must do equity."

We have before observed that, if one party wish to compel a specific performance by the other, he must make his own part of the agreement precedent. So, if a plaintiff apply for the aid of a court of equity, he must come into court with clean hands; for, "he who seeks equity must do equity:" therefore if a party file his bill for specific performance, and it can be shown, even by parol evidence, that there has been any mistake, or omission, or unreasonableness, fraud, surprise, concealment, misrepresentation, whether wilful or not, or unfairness, as in case of intoxication, attending the transaction; in any of these cases the plaintiff's bill will be dismissed (*a*). And notwithstanding there may be a *valid legal* contract, yet if it be tainted with fraud, or mistake, or surprise, materially affecting the whole substance or character of the transaction—or if uncertainty or great hardship appear—or if there have been unreasonable delay in the party seeking the assistance of the court, or a want of mutuality—or if the parties be legally incompetent to fulfil the contract, or there be no consideration, or at best only an inadequate consideration—equity will relieve (*b*).

If agreement originally fair, not to be set aside.

If an agreement be fair and reasonable at the time of its commencement, any subsequent increase or depreciation of value will not be a ground to impeach the transaction or resist a specific performance of the agreement, provided the parties acted with full knowledge of the nature of the property and its possible liability to fluctuate in value (*c*).

(*a*) 1 Madd. 405; Shrewsbury and Birmingham Railway Company *v.* North Western Railway Company, 6 H. of L. 113; Falcke *v.* Gray, 4 Drew. 651; Tilderley *v.* Clarkson, 30 Beav. 419; Ormes *v.* Beadel, 2 Giff. 166.

(*b*) Atk. Mark. Titles, 83.

(*c*) Revell *v.* Hussey, 2 Ball & Beat. 287; Sug. V. & P. 14th ed. 211, 291.

Bill for specific performance to refer matters to arbitration not entertained.

But a bill for the specific performance of an agreement to refer matters to arbitration will not lie; if the court be not party to the agreement, it cannot give the arbitrators authority to examine upon oath. Moreover, neither a court of law nor equity will enforce an agreement which might have the effect of ousting them of their jurisdiction (*d*),* and violating the rules of public policy by excluding parties from their appropriate judicial tribunals.

Parties attempting to shield themselves under the rules of the court, from the consequences of their own acts, not favoured.

But notwithstanding, as a general proposition, an agreement to refer disputes to arbitration will not deprive the court of its jurisdiction, nor bind the parties before they seek its aid, the court will not look very favourably upon a person who insists upon its protection against the effects of his own contract, before he has attempted to settle the point of dispute by the means the parties had already agreed upon (*e*).

Sale of the goodwill of an attorney's business.

With regard to the sale of the goodwill of an attorney's business, it was decided, in the case of Bunn *v.* Guy (*f*), to be valid where the contract was attended with partial restrictions on the practice of the vendor, such as not practising within a certain distance, etc. Against the contract there were the following objections raised:—1, That the deed was without consideration, the goodwill of an attorney's business being personal, depending upon his integrity and skill in his profession, and therefore not capable of transfer; 2, That the permission by the vendor to the purchasers to use his name as attorney was

(*d*) Kell *v.* Hollister, 2 Bos. & P. 131; Street *v.* Rigby, 6 Ves. 818; Agar *v.* Macklew, 2 S. & S. 418; Wilks *v.* Davis, 3 Meriv. 507.

* But *vide* 11th section of the C. L. P. A. 1854.

(*e*) Waters *v.* Taylor, 15 Ves. 10; Cheslyn *v.* Dalby, 2 Y. & C., Ex. 170.

(*f*) 4 East, 190.

contrary to the policy of the law—it being inconsistent with his duty as an officer of the court, which was a personal trust; 3, That the agreement to recommend the purchasers was contrary to morality—being absolute, and not "provided they continued worthy of the recommendation."

Bunn v. Guy.

The above case was sent from the Court of Chancery to the King's Bench, for the opinion of the judges in that court; the question being whether the contract was good at law, so that the vendor could recover the money stipulated to be paid for the business in an action against the purchasers. The court, upon hearing the arguments, overruled the above objections, and certified in favour of the validity of the deed. Lord Eldon, in a subsequent case (*g*), referring to this certificate in Bunn *v.* Guy, says, "It has happened to me to know that it is no uncommon thing for gentlemen leaving the profession to stipulate for an annuity payable out of the future profits. I have thought that, consistently with the policy of the law, agreements could not be made by which they contract to recommend those who succeed them. I doubted whether professional men could be recommended, not for skill and knowledge in their profession, *but for a sum of money paid and advanced.* I knew that this would rip up many transactions, and I was happy that the Court of King's Bench was of a different opinion; though I *never could entirely reconcile myself to their doctrine.*" It is clear, from the just sarcasm couched in this declaration, that his lordship considered the practice of selling an attorney's business might have a most pernicious tendency, and that the certificate of the learned law judges did not exactly coincide with his own opinion upon the subject.

(*g*) Candler *v.* Candler, 1 Jac. Rep. 231.

CHAP. VI.

Bozon *v.* Farlow.

In the case of Bozon *v.* Farlow (*h*), specific performance of an agreement to purchase the business of an attorney was refused, at the instance of the vendor; there being no express stipulation by which the court might be enabled to carry it into effect on his part in return for the defendant's purchase-money; and there being no conditions generally applicable to transactions of this nature, so as to come within the description of "usual clauses," to be inserted in an instrument to be drawn up in pursuance of the agreement. The master of the rolls, Sir W. Grant, in his judgment, alluding to the main facts of the case, and the principle upon which specific performance is enforced by the court, says, "the defendant agrees to give £3,075 for the plaintiff's business, and the plaintiff agrees that, at a certain period, his business shall be transferred to the defendant. Now the business of an attorney consists in his being employed by others from the confidence which they repose in his skill and integrity. In what way then is the court to decree the transfer of such a business? What is it that I am to direct Mr. Bozon (the vendor) to do, towards the fulfilment of his part of the contract? The court must be able to prescribe to both parties what it is that they are reciprocally to perform. *The very ground on which the jurisdiction of a court of equity, in decreeing a specific performance, is founded, is that it is able to give possession of every thing which is the subject of the agreement, and which a court of law cannot do.* But when I order Mr. Farlow (the purchaser) to pay his £3,075, in what way am I to proceed in order to put him in possession of Mr. Bozon's business? What act am I to direct Mr. Bozon himself to perform, in order to effect that purpose?"

(*h*) 1 Meriv. 459.

The last-mentioned judge, at the same time, also alluding to the case of Bunn *v.* Guy, said, there was no occasion to consider whether the agreement could be specifically performed; the only question was, whether a legal consideration existed for the securities that had been actually executed. "In that case, however," continued the learned judge, "there were means devised by which Mr. C.'s (the vendor's) business might have been made to pass into the hands of the other parties; for it was stipulated that he should not in future practise as an attorney within a hundred and fifty miles of London; that he should permit his name to be used in the firm for a considerable time after he quitted the business; lastly, and principally, that he should endeavour, by all the means in his power, to influence and induce his clients to become the clients of Bunn and Guy. The lord chancellor doubted not only the propriety, but the legality, of some of those conditions; and, though it was ultimately determined that they were not illegal, I think he would hardly have decreed them to be specifically executed" (*i*).

Consequence of gross laches.

If there have been very gross laches in parties entitled to a specific performance of an agreement, or, in other words, where they have for a long time slept upon their rights, a specific performance has been refused; for he who claims the aid of the court to enforce a contract in specie, must prove himself to have been "ready, desirous, prompt, and eager to fulfil it;" but what length of time must necessarily expire before the contract shall be dissolved seems to depend much upon the nature of the agreement and the circumstances which attend it. Thus, where there is a contract for the sale of a reversion, and part of the terms is that the money shall be paid at a

(*i*) And see Whittaker *v.* Howe, 3 Beav. 383; Aubin *v.* Holt, 2 K. & J. 66, that such contracts will be enforced.

CHAP. VI.

fixed time,—if it be not so paid, by default of the purchaser, the vendor is discharged from his contract; for no man who is not in distressed circumstances would sell a reversion: and it would frustrate the very object he had in view if he were entitled only to interest on the purchase-money during the delay (*k*).

As to interest

In general, if the vendee do not pay the purchase-money at the time fixed, he will be chargeable with interest thereon at four (*l*), and sometimes even five per cent. (*m*); and will be bound to endure any losses the estate may sustain, but will be entitled to any profit which may accrue in the meantime, whether he does or does not enter into possession.

at law and in equity.

When interest is recovered at law it is always at the rate of 5*l.* per cent., but in a court of equity 4*l.* per cent. is the usual interest allowed (*n*).

Parties able and willing.

The parties must be *able and willing to contract;* therefore an agreement by a *feme covert*, for the sale of her estate, cannot be enforced either at law or in equity, unless the estate be settled to her separate use, so as to empower her to dispose of it as if she were sole: and no agreement entered into by her husband for his wife, in respect of her property, will be binding on her (*o*), unless he first gain her consent.

Lunatic cannot contract.

An agreement by a lunatic cannot be carried into execution; but the subsequent change of the mental condition of a person who has entered into an agreement, by becoming lunatic, will not affect the rights of the parties (*p*). And a conveyance from the lunatic's side

(*k*) Newman *v.* Rogers, 4 Bro. C. C. 391.

(*l*) Child *v.* Lord Abingdon, 1 Ves. jun. 94.

(*m*) Waldron *v.* Forrester, Excheq. 30th June, 1807; Sug. V. & P. 631, 643.

(*n*) Sug. V. & P. 14th ed. 643.

(*o*) Ibid. 206.

(*p*) Ibid. 208.

can now be made and enforced under the 16 & 17 Vict. c. 70. If also the other party were not aware of the insanity the contract will hold, though the insanity be subsequently found (*q*).

Mutuality of remedy necessary in contracts.

To enforce the specific performance of agreements the remedy must be *mutual;* therefore, if an infant enter into a contract for the sale or purchase of an estate, he cannot enforce it in equity, for the remedy is not mutual: but although an infant is not bound to complete a contract, yet if he enter into a contract for the purchase of an estate, and pay a deposit, he cannot, by declining to complete the purchase, recover the deposit; that is, supposing he was not induced by fraud to engage in such contract (*r*).

Intoxication will vitiate a contract.

Neither will the court decree a specific performance of a contract made when one of the parties was in such a state of intoxication as not to have a full understanding of what he was doing, and it makes no difference that the party was not inveigled into drink by the plaintiff (*s*). But it would seem that the court interferes in these cases only on the ground of fraud; and without that, whatever may have been the excess of intoxication, the party complaining will be left to his remedy at law upon the plea *non est factum* (*t*), and cannot obtain the active aid of the court to set aside the contract.

Certainty and equality of agreement.

The agreement must be *certain, defined, and equal,* otherwise the court cannot decree a specific performance. Thus, where a tenant in tail, with a power to make a jointure of lands situate in the several counties of A., B., and C., in consideration of marriage and a portion which

(*q*) Sug. V. & P. 14th ed. 208.

(*r*) Ibid. 209. See Vansittart *v.* Vansittart, 4 K. & J. 62.

(*s*) 1 Madd. 303; and see Malins *v.* Freeman, 2 Keen, 34; Sug. V. & P. 14th ed. 212.

(*t*) See Platt on Leases, vol. 1, p. 45, and the cases there referred to.

CHAP. VI.

he received with his wife, covenanted by articles before marriage to settle a jointure, but without saying out of what lands in particular, and died before any settlement was made, the wife having also died, her executrix filed her bill for an account of the profits of the lands agreed to be settled, the bill was dismissed (*x*).

Must be fair and reasonable.

The agreement must also be *fair;* that is, the consideration must not be *inadequate* or *unreasonable,*—for a specific performance of a contract will not be decreed if the party against whom it is sought to be enforced can show that the price was so unfair or unconscionable as to be, of itself, evidence of fraud or when taken with the other circumstances of the case (*y*); but the agreement, if impeached, must be so at the time of its commencement, for any casual accident happening to the property subsequent to the agreement will not form a ground of objection to the specific performance, unless, by means of such accident, the property has become so changed that it cannot be enjoyed in manner prescribed by the agreement itself (*z*).

Principle upon which specific performance of agreements is enforced.

Upon the well known maxim that "equity looks upon things agreed to be done as actually performed," equity considers that what is directed or agreed to be done ought to be done, and that which ought to be done as done; consequently, where a contract has been entered into for the sale of an estate, equity regards the vendor as a trustee for the purchaser of the estate sold and the purchaser as a trustee for the vendor of the purchase-

(*x*) Elliot *v.* Hele, 1 Vern. 406; Taylor *v.* Portington, 7 De Gex, M. & G.; Sug. V. & P. 14th ed. 211, 213.

(*y*) Barnardiston *v.* Lingood, Barn. 341; S. C., Collett *v.* Woolaston, 3 Bro. C. C. 228; Vin. Abr. tit. "Contract and Agreement," (P.) Ca. 10 and 12.; Sug. V. & P. 14th ed. 211; Fry, Sp. Perf. 129 *et seq.*

(*z*) Ibid.; City of London *v.* Mitford, 14 Ves. 41.

money (*a*); and it is of no consequence to the completion of the contract that the vendor or vendee died before the day appointed for completing the contract (*b*). In the event, however, of the death of one of the contracting parties the court would have difficulty in enforcing the contract, owing to the position of the persons becoming legally entitled under him: but by divers statutes powers have been given to the court to cause the estates of infant lunatic or absent trustees to be vested in the purchaser, and to bind the interests of minors and unborn children (*c*). And an heir or devisee taking an estate contracted to be sold is within the statutes as a trustee thereof.

If between the articles for the purchase and the actual conveyance any accident should happen to the property, either before or after the day appointed for the conveyance, the vendee must bear the loss: but, on the other hand, he will be entitled to any advantage which may arise therefrom (*d*).

But, although the court will enforce the specific performance of an agreement at the suit of the vendor notwithstanding the estate is destroyed, it is only in case a good title can be shown or the purchaser has waived all objections to the title previously to the accident (*e*). A contract for sale is not discharged by the bankruptcy of the vendor or the intended purchaser (*f*).

(*a*) Sug. V. & P. 14th ed. 175.

(*b*) Ibid. 177; Paul *v.* Wilkins, Toth. 106; Winged *v.* Lefebury, 2 Eq. Cas. Abr. 32, pl. 43; 2 Ves. jun. 183; Spence, Eq. Jur. vol. 2, p. 253.

(*c*) 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55.

(*d*) Sug. V. & P. 14th ed. 177, 291; White *v.* Nutt, 1 P. Wms. 61; Pain *v.* Mellor, 6 Ves. 349.

(*e*) Sug. V. & P. 14th ed. 292.

(*f*) Ibid. 175.

Where a sale takes place under the direction of the court the bidder is not considered as a purchaser until the chief clerk's certificate of the result of the sale has become binding, and he is not liable, therefore, to any loss by fire or otherwise which may happen to the estate in the meantime : nor is he until such confirmation compellable to complete the purchase (*g*).

A purchaser, however, of a life estate is bound from the time his name as purchaser is entered in the bidding paper (*h*).

Upon the principle above stated that equity considers as done what ought to be done—or the doctrine of *conversion*, as it is called—if the vendor die before payment of the purchase-money it will go and must be paid to his executors as part of his personal assets and will be liable to probate duty (*i*), and the heir-at-law or devisee will be obliged to convey the estate ; and so also on the death of the vendee before completion, his heir or devisee will be entitled to the land and can require his executors to pay the purchase-money (*k*).

The principle that by a contract of purchase the purchaser becomes, in equity, owner of the property, applies only as between the parties to the contract, and cannot be extended so as to affect the interests of third persons: therefore, before the contract is carried into effect, the purchaser cannot against a stranger to the contract enforce equities attaching to the property (*l*). It was upon this ground, also, that Lord Eldon, in Mole *v.* Smith (*m*), stated that where a bill is filed for a specific

(*g*) Sug. V. & P. 14th ed. 292.
(*h*) Dan. Pr. 1178.
(*i*) Sug. V. & P. 14th ed. 177.
(*k*) Ibid. 192.
(*l*) Tasker *v.* Small, 3 My. & Cr. 79.
(*m*) Jac. 490—4.

performance, it ought not to be mixed up with a prayer for relief against other persons claiming an interest in the estate.

An agreement by a joint tenant for sale of his share against the survivor will be enforced in equity, provided the articles amount to an equitable severance of the jointure ; and a covenant to sell will sever the joint tenancy in equity, although not at law (*n*).

When an agreement consists of two parts, and one of them cannot be enforced, the Court of Chancery will, nevertheless, compel the performance of the other part where it is quite distinct, and mainly founded on a distinct valuable consideration, although the part which cannot be enforced may have formed part of the inducement to enter into the other part which is enforced (*o*).

Conversion.

Under this doctrine of conversion (which may be a little more fully considered in this connection) if money be directed by will or otherwise to be laid out in the purchase of land, in equity it is considered as land, and has all the incidents of real estate. It will pass as land by devise (*p*), although the estate itself be not conveyed to the purchaser until *after* the execution of his will (*q*); but if a testator direct his real estate to be sold, and the produce, or any part of it, to be applied for a particular purpose *only*, which fails, the money intended for that purpose retains the quality of real estate and belongs to the heir (*r*): when, however, the purpose is ulterior to the payment of the legacies on behalf of the prohibited

(*n*) Sug. V. & P.

(*o*) Rolfe *v.* Rolfe, 10 Jur. 61; 6 Law T. 518.

(*p*) Green *v.* Smith, 1 Atk. 573.

(*q*) Brown *v.* Monk, 10 Ves. 597.

(*r*) Gibbs *v.* Rumsey, 2 V. & B. 294; Henchman *v.* Attorney-General, 3 M. & K. 485; Green *v.* Jackson, 5 Russ. 38; Ackroyd

CHAP. VI.

objects, namely, the purpose of division among certain persons described in the residuary gift, those legacies will inure for the benefit of the residuary legatees. No distinction was therefore made between that part of the residue which had arisen from the real estate and that which had issued from the personal estate; and it was settled, before the case of Kennell *v.* Abbott (*s*), that, if an estate be devised charged with legacies, and the legacies fail, no matter how, the devisee shall have the benefit of it, and take the estate.

7 Will. IV. & 1 Vict. c. 26.

And now the question is more clearly settled by the 25th sect. 7 Will. IV. & 1 Vict. c. 26, the New Wills Act, which provides that, unless a contrary intention shall appear by the will, such real estate, or interest therein, as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise *being contrary to law*, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in the will.

This section, it will be seen, relates only to lapsed devises of *real* estates. It was already the law as regards residuary bequests of personalty (*t*).

Formerly, a person who would have been entitled to the land if purchased as tenant in tail, was enabled by a court of equity to receive the money if he could have acquired the fee by fine, but not if a recovery would have been requisite, for in this case it was necessary to purchase land in order to suffer a recovery. This was done in

v. Smithson, 1 Bro. C. C. 503; Taylor *v.* Taylor, 3 De Gex, M. & G. 190; Robinson *v.* Governors of the London Hospital, 10 Hare, 19; Buchanan *v.* Harrison, 1 Johns. & Hem. 662, 675.

(*s*) 4 Ves. 802.

(*t*) Jones *v.* Mitchell, 1 S. & S. 294.

order that the remainder-man might have his chance of acquiring the inheritance by the death of the tenant in tail, before the tedious process of suffering a recovery could be effectually carried out (*u*). This inconvenience was removed by 7 Geo. IV. c. 45, repealing the Act 39 & 40 Geo. III. c. 56, intituled "An Act for the Relief of Persons entitled to Entailed Estates to be purchased with Trust Moneys." 7 Geo. IV. c. 45.

These Acts were repealed by 3 & 4 Will. 4, c. 74, s. 70, which Act places money directed to be invested in lands and settled in tail on the same footing as lands entailed, and enables the entail and, with the necessary consents, the remainders over to be barred by a deed enrolled; and when the entail is so barred the court of equity will, if the money is in court, order it to be paid out to the parties who then have the absolute interest in it (*x*).

If an agreement had been entered into by a tenant in tail for the sale of his estate, although binding on himself, yet it could not have been enforced against the issue in tail, unless they were absolutely barred (*y*); because the issue in tail claim *per formam doni* from the creator of the estate tail; and therefore although it was in the power of the tenant in tail to dock the entail (formerly by fine or recovery, but now by deed enrolled),—that not being done, the court could not have deprived them of the right they derived, not from the tenant in tail, but from the author of the estate tail (*z*). And the 3 & 4 Will. 4, c. 74, s. 40, expressly provides that, nothing "resting in contract only," nor any thing less than a deed enrolled, shall have force against

(*u*) Colwall *v.* Shadwell, 1 P. Wms. 471—485.
(*x*) *In re* Smythe, 3 M. & K. 249.
(*y*) Cavendish *v.* Worsley, Hob. 203.
(*z*) Sug. V. & P. 184.

CHAP. VI.

the entail. And even a judgment, duly registered, though by 1 & 2 Vict. c. 110, s. 11, it is enacted that it shall operate as a charge upon all lands, tenements, rectories, tithes, &c., as the debtor, or any person in trust for him, should have been seised or possessed of at the time of entering up the judgment, or at any time afterwards, or over which such person should, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, *without the assent of any other person*, exercise for his own benefit; yet now it will have no operation as a charge until the land is actually taken in execution, 27 & 28 Vict. c. 112, s. 3.

The above example appears to form an exception to the general rule in equity, that what is contracted to be done is to be considered as actually performed: another exception is where, under a mere contract for the sale of an estate, the purchaser will not be allowed to fell the timber growing thereon before he has paid the purchase-money (*a*).

Where an estate is directed to be sold and the proceeds of the sale to be divided among several persons, no one has a right to say that any part shall not be sold and elect to take his share in land—since that would injure the sale of the entirety (*b*).

But if money be directed to be invested in the purchase of land to the use of several persons, as tenants in common, any one of them may elect to take his portion of the money, because the residue of the money may be

(*a*) Crockford *v.* Alexander, 15 Ves. 138.

(*b*) Fletcher *v.* Ashburner, 1 Bro. C. C. 497; Deeth *v.* Hale, 2 Moll. 317; Smith *v.* Claxton, 4 Madd. 484—494; Chalmer *v.* Bradley, 1 J. & W. 59; Trower *v.* Knightley, 6 Madd. 134.

quite as beneficially laid out in the purchase of land as the whole (*c*).

Mortmain Act;

UNDER the Mortmain Act, 9 Geo. II. c. 36,* no real estate whatever, nor any interest therein, nor any personal estate whatever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given for any charitable use whatever.

effects of.

This enactment extends as well to freehold, copyhold, or leasehold estates, as also to money charged thereon: so that not only is a devise of real estates to be sold for charitable purposes void under the Mortmain Act, but where there is even a contract for the sale of an estate at the date of the will, and the testator dies before the purchase-money is paid, the money will not pass by his will to the charity, although there is nothing under the Act to prevent the bequest of pure personalty for charitable purposes. This may at first appear strange, when we refer to those equitable principles upon which the doctrine of conversion depends—namely, in considering that to be done which is intended to be done; as in the common instance, where money is directed to be employed in purchasing land, and land directed to be sold and turned into money, both the land and the money are to be respectively considered as that species of property into which they are so directed to be converted (*d*). Yet the restriction against the doctrine of conversion,

(*c*) Seeley *v.* Jago, 1 P. Wms. 389; Walker *v.* Denne, 2 Ves. jun. 182.

* This is more properly an Act against *superstitious uses*, relating to death-bed alienations of real estate, or any interest therein.

(*d*) Pulteney *v.* Earl of Darlington, 1 Bro. 223, 238; 7 Bro. Par. C. 530.

in reference to charitable bequests, where the vendor dies before the purchase-money is paid, depends upon other reasons, namely, that so long as the money remains unpaid, the vendor has a lien upon the estate for the amount of the purchase-money, which is an interest in the land under the Statute of Mortmain (*b*). Again, where there is a devise of real estates, with a direction that they should be sold, and the money arising from the sale is given to any particular person or persons, the objects intended to be benefited may come into a court of equity, and pray to have the land instead of the money ; therefore it is, that such a direction on behalf of a charity, or for charitable purposes, is void under the 9 Geo. II. c. 36 (*c*).

Reason for passing the Mortmain Act.

"The reason of the statute," says Lord Hardwicke, "was to hinder gifts by dying persons, out of a pretended or mistaken notion of religion,—as thinking it might be for the benefit of their souls to give their lands to charities, which they paid no regard to in their lifetime ; and therefore the Act of Parliament has not absolutely prohibited the disposition of land to charitable uses, but left it to be done by deed, executed a year before the death of the grantor, and enrolled within six months after execution, though this will render them equally unalienable ; but the legislature blended the two inconveniences together,—the acts of languid and dying persons, and the disherison of heirs" (*d*). This statute not only requires that it be done by deed indented, sealed, and delivered a year before the death of the grantor, and enrolled within six months after execution, but also that its execution shall take place in the presence of two or more credible witnesses ; by these means securing every possible protection against a man alienating his property,

(*b*) Harrison *v.* Harrison, 1 R. & M. 71.
(*c*) Middleton *v.* Spicer, 1 Bro. C. C. 201.
(*d*) Attorney-General *v.* Lord Weymouth, Amb. 20.

while *in extremis*, to superstitious uses. Also to render such an alienation, as far as possible, removed from the nature of a devise, which may be revoked or altered at any time according to the will or caprice of the testator, the statute declares that such a deed shall contain no power of revocation. It would seem from the provision that the legislature intended to guard against any incautious disposition of land by deed for charitable purposes, and to suppress as far as possible any lurking notion or secret intention which, at the time of executing such deed of gift, the donor might entertain of revoking it at some future period; which intention, however, would be frustrated by sudden death, forgetfulness, or other causes. If such a liberty were given to settlors, it might operate as an inducement to any improvident disposition of lands for charitable purposes; it therefore exhibits before the settlor at once the full consequences of his voluntary act.

To such an extent have the courts proceeded in their severity against charitable trusts that they have even refused to admit those ordinary rules of legal presumption to operate in favour of the charity which, in other cases, they usually profess to be bound by. Thus, in Doe *d.* Waterton, K. B., the court would not, after the lapse of seventy or eighty years, in the case of a charity, presume that a bargain and sale required by the Act Geo. II. to be essential to its validity had been enrolled.

The judges thought that as certain forms were rendered necessary by the statute they were not at liberty to presume against the policy of the law, and dispense with these forms, to give the charity an estate in the conveyance of which they had not been observed (*e*).

The 11 & 12 Will. III., against Papists, puts the dis-

(*e*) Gresley, Evid. 481.

ability upon the person taking; but the 9 Geo. II. c. 36, lays the disability upon the person devising (*f*).

It was said by Sir John Leach, V.-C., in the Attorney-General *v.* Harley (*g*), that the object of the 9 Geo. II. c. 36, as its title imports, was to prevent land becoming inalienable; but, in order to secure that object, the legislature thought it prudent not merely to prohibit the gifts of lands to charity uses, but to prohibit gifts to such uses of any interest in land, being aware that by circuity and *election* the land itself might be acquired, in most cases, as the result of an interest in land. That money to arise from the sale of land is an interest in land admits of no doubt.

In its general operation the Act has been held to extend to all bequests which are charged upon or which savour of realty, such as mortgage-money, bequests of money charged on or to arise from the sale of real estate, terms of years, money secured on turnpike tolls or on the poor or county rates; also shares held in the New River Company, which, as an old corporation, have been held to be real estate (*h*). But, where certain property has, by Act of Parliament, received the stamp of personalty, such as shares falling within the 8 Vict. c. 16, s. 7, "The Companies Clauses Consolidation Act," which are declared to be personal property; arrears of rent (*i*); shares in joint-stock companies, as canal, dock, railway, waterworks, gas-light, and banking companies, &c.; these are not within the stat. 9 Geo. II. c. 36, although real estate may form part of their property, whether the company be incorporated or not.

(*f*) Attorney-General *v.* Lord Weymouth, Amb. 20.

(*g*) 5 Madd. 321.

(*h*) Wms. Ex., 5th edit. 956; Wordsw. Joint Stock Co., 5th edit. 359.

(*i*) 25 Law Jour. R., Ch. 86.

Where a sum of money was directed to be laid out in building a church, it was considered to be void, as a direction to build includes a direction to purchase for the purpose of building, unless a testator distinctly refers to land already in mortmain (*j*). But a bequest, out of a real estate, to erect a monument in a church to the testator's memory is not within the Act (*k*). Also, a good charitable bequest may be made, to be laid out on land to be afterwards acquired, not by means of that money, but by gift or otherwise; that is, if the donees were directed to hire or beg the land. A gift by will of money for the maintenance of almshouses, if within a year from the death of testator another person should give land and build the almshouses, is not within the Act (*l*).

The Statute of Mortmain, 9 Geo. II. c. 36, being passed for purposes wholly political, arising out of local circumstances, does not extend to the island of Grenada, in the West Indies. Its operation, therefore, is only local (*m*).

Leasehold bequests void under the Statute of Mortmain.

As to gifts by will of leaseholds to charitable uses, they are void, whether specifically bequeathed or included in a disposition of the residue, either by name or in a general description of the testator's personal estate (*n*). But, in the Attorney-General *v.* Graves (*o*), it was contended that the words of the statute, "any estate or interest whatever," only applied to a division of the tes-

(*j*) Pritchard *v.* Arbouin, 3 Russ. 456.

(*k*) Mellick *v.* Asylum, Jac. 181.

(*l*) Philpott *v.* St. George's Hospital, 6 Dom. Proc. H. of L. Cas. 338; 3 Jur., N. S. 1269; 5 W. R. 845.

(*m*) Attorney-General *v.* Stewart, 2 Mer. 143.

(*n*) 4 Ves. 732; 2 Eden, 207; Amb. 155, 158, n.; ibid. 216; White *v.* Evans, 4 Ves. 21; 3 Madd. 467.

(*o*) Amb. 155.

CHAP. VI.

tator's own lands, and not to that which he held as lessee. This distinction, however, was overruled on the annulling clause (*p*).

It has been held that, when an undefined portion of a fund is bequeathed to a *void* charity, and the residuary part of that fund is given for *legal* charitable purposes, but it cannot be ascertained how much was intended or would be required for the *illegal* object, the gift will fail altogether (*q*); but if they are not inseparable, and the proportions are defined, or capable of being exactly calculated, the bequest may be supported (*r*).

But where a bequest of personal property for charitable purposes, which if standing alone would be valid, is connected with, and made dependent upon, the 9 Geo. II. c. 36, the devise being the principal, and failing, the accessary must fail with it.

Durour *v.* Motteux.

In Durour *v.* Motteux (*s*), the testator directed his real estate to be sold, and, together with personalty, applied (*inter alia*) to charitable purposes, and directed the trustees to place out all the residue of his estate, and the interest thereon, on securities, and divide it among several persons,—Lord Hardwicke held, first, that the bequest to the charity was void, and next, that the whole, as to other matters, was turned into personalty, and forming the residue, it included everything as a void legacy, or one that has lapsed: and Sir John Leach, upon the authority of this case, held, in Green *v.* Jackson (*t*), that the failure of the charitable bequest inured to the benefit of the residuary legatees, and that *no distinction* could be

Mixed fund.

(*p*) Shelf. on Mortm. 154.

(*q*) Chapman *v.* Brown, 6 Ves. 404; Attorney-General *v.* Davies, 9 Ves. 535; Limbrey *v.* Gurr, 6 Madd. 151.

(*r*) Blandford *v.* Thackerell, 2 Ves. jun. 238.

(*s*) 1 Ves. 320; 1 Sim. & S. 292, n. (*d*); 1 M. & K. 661.

(*t*) 5 Russ. 35; see Roberts *v.* Walker, 1 R. & M. 752.

made between that part of the residue which had arisen from the personal estate.

Marshalling assets, not allowed in charitable legacies.

In one case it was contended that the particular charitable legacies ought, at all events, to be paid out of so much of the residue as consisted of pure personalty, which was amply sufficient for that purpose ; but Lord Cottenham observed, "This would be marshalling the assets at least against the next of kin, and would be contrary to the rule of the court, adopted in all such cases, which is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as would in that way be to be paid out of the prohibited fund" (*u*). Where a testator has charged his estates generally with payment of his debts, charitable and other legacies, the following scheme for the administration of assets in reference to charitable bequests, deducible from the various cases, and from the general practice of the courts, may be relied upon for correctness in principle :—

Manner in which the court deals with a mixed fund in charitable bequests.

By making the real, the leasehold, and the personal estates one common fund for the payment of his debts, general and charitable legacies, the testator shows his intention that each estate shall bear its proportion of each payment ; but the law does not allow the payment of charitable legacies out of real estates, or estates savouring of realty—such as leaseholds: therefore, although there might have been originally sufficient out of the pure personalty to answer all the calls of creditors, of general and also of charitable legatees, yet, as the testator intended each estate to contribute rateably, the court, before paying anything to the charitable lega-

(*u*) Williams *v.* Kershaw, 1 Keen, 274, n.; Seton's Or. 128; Attorney-General *v.* Southgate, 12 Sim. 77; Philanthropic Society *v.* Kemp, 4 Beav. 581.

CHAP. VI.

tees, will ascertain what proportion of them was, with reference to this intention, payable out of the pure personal estate, and will only allow them such proportions of their legacies as would thus have fallen upon the pure personal estate. So that, as is the aggregate fund *intended* by the testator to be charged to the fund *the law allows* to be charged, so is the full amount of the legacy to the sum which the law will pay out of the pure personalty. Thus, suppose the real estate to be worth 3,000*l.*, the mixed 2,000*l.*, and the pure personal to 1,000*l.*, and the testator gives a charity legacy of 300*l.* chargeable upon the whole of his property, then, under the above calculation the charity will only gain 50*l.*

Divers other Acts relating to mortmain have been passed.

The Act 9 Geo. IV. c. 85, was passed to remedy defects in respect of trust deeds for charitable and religious purposes, where, from ignorance or carelessness, the requirements of the 9 Geo. II. c. 36, had been wholly disregarded; and to confirm them when founded on a valuable consideration, and made to take effect immediately and without any reservation for the benefit of the donor. The Act does not dispense with the requirements of the 9 Geo. II. c. 36, as regards trust deeds made after the 25th July, 1828.

By the 24 Vict. c. 9, the legislature again interfered on behalf of charitable uses, by giving parties twelve calendar months after the 17th May, 1861, to enrol their deeds, sect. 3.

The 25 Vict. c. 17, extends the time for enrolment to the 17th May, 1864.

The 24 Vict. c. 9, enacts, that a sale for a full and valuable consideration shall not be deemed void by reason of the consideration consisting wholly or partly of a rent,

rent-charge, or other annual payment reserved as therein mentioned, sect. 3.

This last-mentioned Act (sect. 4) provides that, where a deed declaring charitable uses has been enrolled prior to the passing of the Act, it shall be valid notwithstanding any prior deed conveying the hereditaments for valuable consideration for the purpose of such uses shall not have been enrolled.

The 25 Vict. c. 17, s. 4, enacts, that the 4th section of the last-mentioned Act and also this present Act shall apply as well to cases where such separate deed or instrument shall be or shall have been executed after, as to cases where it may have been executed before, the passing of the said Act; provided that, if not already executed, it be executed within six months next after the passing of this Act.

By the 26 & 27 Vict. every deed or assurance by which lands shall have been demised for any term of years for charitable uses shall be deemed to have been made to take effect for the charitable use thereby intended immediately from the making thereof, if the term for which such land shall have been thereby demised was thereby made to commence and take effect in possession at any time within one year from the date of such deed of assurance.

The 29 & 30 Vict. c. 57, provides for enrolment, with the sanction of the Court of Chancery, where possession is held under the deed and the court is satisfied the enrolment was accidentally omitted.

CHAPTER VII.

TRUSTS.

Trusts.

PERHAPS there is not any part in the chancellor's jurisdiction in which he is called upon to exercise a more exclusive and extensive authority, than in matters of trust: and notwithstanding the doctrine of trusts, which are said to be creatures of equity, was unknown to the common law, yet they have been gradually settled and moulded into a certain system, and are governed by nearly the same rules which are applicable to an estate at common law (*a*).

Description of a trust.

A trust bears almost an exact resemblance to what a use was before the statute (both arising out of the same court), with this exception: but it was held under the statute presently mentioned that nothing could be granted to a use, whereof the use is inseparable from the possession, "quæ usu consumuntur," or whereof *seisin* could not be instantly given, and therefore could not be granted of personalty, such as terms of years or other chattel interests, whereof the termor is not *seised* but only *possessed;* but trusts may be created either of real or personal estates.

Uses and trusts.

Uses and trusts derived their origin from the same source, *i. e.* the *fidei commissum* of the Civil Law, introduced by Augustus, which was the grant of an inheritance to one in trust, that he should convey it or dispose of the profits at the will of another. This created a

(*a*) 2 P. Wms. 645, 668, 669.

right in the party at whose disposition the estate was held in confidence, called the *jus fiduciarium*, which might be enforced by the prætor especially appointed for that purpose, styled the *prætor fidei commissarius* (*b*).

Fidei commissum; what.

The *fidei commissum* until the time of Augustus was left entirely to the honour and good feeling of the person in whom the trust was reposed. This emperor, by reason of the abuses which in too many instances were committed by persons unworthy of the confidence reposed in them, instituted a jurisdiction to enforce these trusts in conscience. It may at first sight appear somewhat strange that a person, for the sake of benefiting his own family, should voluntarily place his estate and property into the hands of an irresponsible person, relying solely upon his honesty and integrity for the due performance of the trust, rather than give the property at once to his family, or to those whom he intended as objects of his bounty; but the *fidei commissum* was originally a practice invented for the purpose of evading one of the prohibitory laws of the Roman Republic which related to successions and legacies, and more especially the Voconian law, which precluded any person who happened to be included in the census from appointing a female or even an only child as heir. To obviate this hardship, and to ensure as far as possible the intention of the testator, it became the custom to constitute by will a qualified citizen as *hæres*, with a request *.that he would convey the inheritance or restore the legacy to some persons or person pointed out by the testator who could not take it directly under the will.†

(*b*) Inst. lib. 2, l. 23.

* The words chiefiy used in the *fidei commissa* were peto, rogo, volo, mando, fidei tuæ committo.—Just. Inst. lib. 2, t. 24, s. 3.

† "Quibus enim non poterant hæreditatem vel legata relinquere, si relinquebant, fidei committebant eorum, qui capere ex testamento

CHAP. VII.

Prætor fidei commissarius.

Augustus having brought this species of trust under a judicial cognizance by the appointment of a *prætor fidei commissarius* at Rome, to give judgment in these cases of conscience, a similar jurisdiction was exercised over them by the præses in the provinces, but without the formalities exercised in conducting the pleadings in the courts of judicature (*c*).

Doctrine of trusts; by whom introduced into England.

This fiduciary doctrine from the Roman law was, we are told, first introduced into England by the foreign ecclesiastics, who being keen adepts in evading the various statutes enacted from time to time for the purpose of stemming their successful encroachments upon the fair territories of this island, and being well versed in all the subtle refinements of the Civil and Canon Laws, applied the Roman doctrine of the *fidei commissum* to evade the statutes of mortmain, by obtaining grants of land, not to their religious houses directly, but *to the use* of such houses, which the chancellors, who were in those days of the clerical order, held to be *fidei commissa* (*d*): and as they were not enforcible by any legal remedy making it binding on the conscience of the nominal feoffee to account to his *cestui que use* for the profits of the estate, the *cestui que use* was thus thrown entirely upon the conscience and good faith of his trustee; and hence, from the reign of Henry IV., *feoffments to uses* became a most profitable source of business for the interposition of the Court of Chancery (*e*). And, although the equitable

poterant. Et ideò fidei commissa appellata sunt quia nullo vinculo juris sed tantum pudore eorum, qui regebantur, continebantur. Postea Divus Augustus primus semel iterumque gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere."—Ibid. t. 23, s. 1.

(*c*) Spence, Eq. Juris. 437.

(*d*) Bl. b. ii. 328; Doc. & Stud. c. 22. (*e*) Palgr. Counc.

jurisdiction of the Court of Chancery did not arise out of these circumstances, still it is very evident that they greatly assisted in its development (*f*). The doctrine of *fidei commissa*, or uses, unknown to the common law, was introduced about the latter end of the reign of Edward III. In succeeding reigns the legislature was employed in framing statutes and passing laws to remedy the inconveniences which were felt in every quarter by reason of the ownership being thus in the view of the court of law in one man, and in the eye of equity in another; the provisions of which statutes all tended to consider the *cestui que use* as real owner of the estate, and allowed actions in respect of the estate to be brought against him, if in actual enjoyment of the rents and emoluments, without regard to his nominal feoffee, until the statute 27 Hen. VIII. c. 10, called the *Statute of Uses* or the statute *For Transferring Uses into Possession*, carried this idea of absolute ownership into full effect.

Statute of Uses;

By this statute it was provided that "when any person shall be *seised* of lands, &c., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life, for years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition as they had before in the use."

its effect.

The effect of this statute, therefore, was to destroy the intervening estate of the feoffee to uses, and by the instantaneous transmission of the estate from him to the

(*f*) 2 Co. Inst. 553; Hale's Juris. of the House of Lords, 46.

CHAP. VII.

cestui que use, to create in the latter a legal instead of an equitable ownership. The equitable use being a trust before the statute becomes a legal estate by the statute. It *executes* the use, *i. e.* it conveys the possession to the use, and transfers the use into possession. But, as religious houses could not by the former Acts take or be seised of the estate so given to them, the statute in cases in which estates were given to or for the use of such houses failed to confer or transmute into a legal seisin or ownership the use so given; although it succeeded in taking the estate from the feoffee to uses.

Defect of the statute.

A new and very serious difficulty, however, was discovered to have arisen out of the statute soon after it came into operation; and which at first the framers of it never contemplated. This statute, which transfers the use into possession, speaks of *one* use only, and not a *succession* of uses; as therefore the judges, in those times of subtle disquisition, determined that there could not be a use upon a use (*g*), it followed that where a feoffment was made to A. and his heirs, to the *use* of B. and his heirs, to the *use* of or in trust for C. and his heirs, this last use was a mere nullity (*h*), because the statutes execute the *first* use only, and speaks not of a second one; therefore the estate being instantaneously conveyed from A., the first feoffee (whose seisin is but momentary), to B., by virtue of the statute, B. becomes complete legal owner of the estate, of which he cannot be divested, however contrary to the original intention of the parties. It was now that a court of equity interfered to prevent so manifest a grievance, which the statute itself could not remedy.

(*g*) It being held that one man could have the legal right to and possession of the land upon trust to permit another to use and enjoy the profits thereof, although he might not have the actual use and enjoyment upon trust to permit another to have the same.

(*h*) Bl. b. ii. 336; Madd.

This was not by absolutely divesting the estate from B., of which he became seised under the statute: but by declaring a trust of the use itself and compelling him, as in conscience bound, to hold the estate in *trust* for C. and his heirs, in the same manner as he would have done as feoffee to uses before the statute; for as the terms of the statute were satisfied by executing the use in B., and the statute becoming thus, as it were, *functum officio*, the Court of Chancery was at liberty to exercise its jurisdiction by constituting him a trustee for the purpose of carrying into effect the manifest intention of the parties. There was no difficulty in equity in holding that one man might have the actual use and pernancy of the profits, and give to another the benefit thereby derived. Thus was the old doctrine of uses, that existed before the passing of the statute, afterwards revived under the denomination of *trusts*.

Doubts formerly entertained as to its effects.

A change so extensive in the law of real property as the one created by the Statute of Uses was of course subjected to much doubt and comment by our earlier lawyers, who felt and confessed themselves unable to trace its consequences throughout all its various modes of application. Thus, Lord Bacon calls it "a law whereupon the inheritances of this realm are tossed at this day like a ship upon the sea, in such sort that it is hard to say which bark will sink and which will get to the haven; that is to say, what assurances will stand good, and what will not, whether is this any lack or default in the pilots, their grave and learned judges?" (*i*).

Different interests in land.

Lord Hardwicke has classed the different interests in land into three kinds, namely:—1. The estate in the land itself, the ancient common-law fee. 2. The use, which was originally a creature of equity; but which, since the

(*i*) Law Tracts, 299.

CHAP. VII.

Statute of Uses, draws the estate in lands to it, so that they are joined, and make one legal estate. 3. The trust which the common law takes no notice of, but which carries the beneficial interests and profits into this court, and is still *a creature of equity*, as the use was before the statute (*k*).

Use and trust, synonymously used.

From this classification it will be seen that *uses* under the statute are subject to the jurisdiction of a court of common law, and *trusts* to that of the courts of equity, and originally the words *use* and *trust* were synonymously used, and are both mentioned in the statute. But as the provisions of the statute were not deemed co-extensive with the various modes of creating uses, such uses as were not provided for by the statute were left to their former jurisdiction as mere trusts (*l*). In other words, the Court of Chancery, by its writs of subpœna, obliged the feoffee to appear in court and disclose his trust, and then the court compelled him to execute it (*m*). It is in this sense that uses before the statutes are said to be similar to trusts in a Court of Chancery, of which the common law takes no notice; "for at law," said Lord Hardwicke, in the case of Bagshaw *v.* Spencer (*n*), "before the statute, every use was a trust."

Conscience, legally considered.

The word *conscience*, as denoting a rule of judicial conduct, is also of clerical invention, and was by it made applicable, as far as circumstances would admit, to those or similar cases which in the civil law were regulated upon the principle of the *bona fides* adopted by the prætors, embracing all these obligations which arose from certain parties being so situated that the one had a right

(*k*) Willett *v.* Sandford, 1 Ves. 186.
(*l*) 2 W. Bl. 136.
(*m*) 3 Reeves' Hist. 192.
(*n*) 2 Atk. 574.

to expect from the other the exercise of good faith. Hence very early the doctrine of uses was referred to the obligations of conscience, after uses had become cognizable in our courts of law. "Uses are created by the common law, and are relievable by conscience" (*o*).

Modern trust, somewhat similar to the ancient use.

Trusts being, therefore, the offspring of equity, and unknown to the common law, it follows that they are governed by equitable rules, and have no necessary dependence for their operation upon the principles which regulate the decisions at common law, which never took cognizance of matters lying solely *in foro conscientiæ*. They are, as we have observed, what *uses* were before the statute; after the statute uses became legal estates, the object of the statute being to destroy their fiduciary character, which, however, the Court of Chancery revived, under the denomination of *trusts*, the *trustee* standing in the situation of the ancient *feoffee to uses*, and the *cestui que trust*, for whose benefit the trustee is vested with the estate, taking place of the *cestui que use*.

Definition of trust.

A *trust* may be thus defined: a confidence reposed in another in such a manner as gives a right in the *cestui que* trust to receive the profits, and to dispose of the lands or interest in equity (*p*), whilst such other person has the legal interest.

Trusts are either *express*, namely, such as are created by the express intention of the creator by deed or will or otherwise; or *implied*, which term may be taken to comprehend all such as are not express, but which arise by implication of law or the acts of the parties.

Declarations of trust of interest in land, whether freehold, copyhold or leasehold, must, under the Statute of Frauds (29 Car. II. c. 3, s. 7), be in writing; but express

(*o*) Spence, Eq. Juris. 411, n. (*e*).
(*p*) 1 Madd. 17.

CHAP. VII.

trusts of chattels personal may be created by word of mouth (*q*).

No precise form of expression is necessary to the creation of an express trust: the words may be sufficient though there may be the absence of any expressions which in terms import confidence (*r*). But the property to be included, and the objects to be benefited and the benefit to be given, must all be certain and defined. "Wherever a testator points out the objects, the property, and the way in which it shall go, that creates a trust, unless there are plain express words or necessary implication that he does not mean to take away the discretion, but intends to leave it to be defeated :" per Lord Alvanley (*s*).

Implied.

Among *implied* trusts are those relating to the administration of assets and the payments of legacies; for if the executors and administrators be not *expressly* trustees for this purpose as well as for the other duties which devolve upon them in their office, they are so by implication in a court of equity; and the whole jurisdiction of the court in the administration of assets is based upon the principle that it is the duty of the court *to enforce the execution of trusts* (*t*).

Trusts by *construction*,—where, for instance, no trust was at first contemplated, but by the decision of the court a party has, by reason of certain transactions, been held to be a trustee—may be classed as implied trusts.

Lord Nottingham, in order to restrict the too great latitude to which the doctrine of implied trusts might

(*q*) Bayley *v.* Boulcott, 4 Russ. 345; M'Fadden *v.* Jenkyns, 20 L. J., Ch. 280; Hare, 169.

(*r*) 1 Spence, 498; and see Lew. Trusts, c. 8, s. 2, as to what expressions will suffice to create a trust.

(*s*) Malim *v.* Keighley, 2 Ves. jur. 335, cited Lew. Trusts, 169.

(*t*) 1 Mad. 578.

otherwise be extended, lays it down as a rule to which there is no exception, "that the law never implies—the court never presumes a trust but in case of absolute necessity. The reason of this rule is sacred:" for "if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is open to the lord chancellor to construe or presume any man in England out of his estate." (Cook *v.* Fountain, 3 Swanst. 592.)

Executor; when regarded as trustee.

Where a testator devises a chattel interest, it amounts to a declaration by the testator that his executor shall stand as a trustee for the legatee in respect to that interest, and vests nothing in the devisee until the executor gives his assent; it is for this reason only that a bill can be sustained in equity by the devisee against the executor for his legacy (*u*); and Sir Edward Sugden, in his Essay on the New Statutes, p. 106, referring to certain Irish cases, says it was plain that, except through means of a trust, no legacy could be charged on a real estate.

Executor's right, formerly, to undisposed-of residue;

Formerly, by the common law, the executor took for his own benefit all the personal property that remained undisposed of by the will, after paying thereout the funeral expenses and debts of the testator. But where, upon the face of the will, the courts of equity have seen sufficient to convince them that the testator did not intend the executor to take the surplus beneficially, as when he was expressly called an executor in trust, or when it appeared by any expression the office only to have been intended thereby, and not the beneficial interest, they have converted the executors into *trustees* for those persons on whom the law would cast the surplus in case of a complete intestacy, *i. e.* the next of kin; and where there was a residuary clause, but the name of

(*u*) Wind *v.* Jekyle, 1 P. Wms. 575.

CHAP. VII.

the residuary legatee was omitted to be inserted, the executor could take no benefit thereby; also, where the testator has in a former part of his will given the executor a pecuniary legacy, this was presumed to afford sufficient reason for excluding him from the residue; for as the legacy itself comes out of the residuary fund, it was absurd to suppose that the testator would give expressly a *part* of that fund to a person he intended should take the whole (*x*). And the reason why the Court of Chancery must be resorted to for compelling the distribution of the undisposed surplus of a testator's estate is, because the spiritual courts cannot enforce the execution of a trust (*y*). But the 1 Will. IV. c. 40, has altered the common law as to the undisposed-of residue; for by section 1, it enacts that where no disposition is made of the residue, the executor shall be deemed by the court of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto, that the person so appointed executor was intended to take such residue beneficially. But the Act is not intended to prejudice any right to which the executor, if the Act had not been passed, would have been entitled in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions in respect of any residue not expressly disposed of (sect. 2).

altered by stat. 1 Will. IV. c. 40.

Where legacy is charged upon realty as well as personal estate.

It is a rule well established, that where a legacy given to a party is charged upon both real and personal estates, or upon the realty only, and the time of payment has respect to the *legatee personally*, and not the *estate or con-*

(*x*) Farrington *v.* Knightley, 1 P. Wms. 549, *n.*
(*y*) Ibid. 549.

venience of the owner, as where it is given to a legatee at twenty-one or marriage, or to be paid at that age or marriage, the legacy, so far as it is charged on the realty, fails by reason of the death of the legatee before the day of payment, and the personal estate only remains charged (*z*). But where a legacy charged on the real estate has regard in its postponement to the estate itself or its owner, and not to the legatee, the rule is different, and the legacy does not fail or sink into the land by the death of the latter before the time of payment (*a*). This same doctrine was in a recent case (*b*) fully recognized by the lord chancellor, who says that "whenever portions or legacies are made payable on an event personal to the party to be benefited, and such party die before the event happen, the portion or legacy is not to be raised out of the land; but if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, as on the death of a tenant for life, then it is raisable after the event, although the term out of which it is to be raised has not arisen, in consequence of the party to be benefited not being *in esse* when the event happens, as in Emperor *v.* Rolfe (*c*), Cholmondeley *v.* Meyrick (*d*), and other cases.

Difference as to the real estate; whether it has respect to the legatee *personally*, or to the convenience of the owner.

For the sake of doing justice, if possible, to every creditor of a deceased person, the court is frequently called upon to arrange the real and personal estate by a process

Marshalling assets;

(*z*) Pawlett *v.* Pawlett, 1 Vern. 321; Duke of Chandos *v.* Talbot, 2 P. Wms. 602; Rowse *v.* Abingdon, 1 Atk. 482; Harrison *v.* Naylor, 3 Bro. C. C. 108.

(*a*) Lowther *v.* Condon, 2 Atk. 127; Watkins *v.* Cheek, 2 S. & S. 199.

(*b*) Evans *v.* Scott, 9 Dom. Proc. Law Times, 510.

(*c*) 1 Ves. 208. (*d*) 1 Eden, 77.

CHAP. VII.

which is called *marshalling assets.* Thus, where a specialty creditor, whose debt is a lien upon the real assets, has exhausted any part of the personal assets in satisfying his own demand, a simple contract creditor shall stand in the place of such specialty creditor, against the real assets *pro tanto: i. e.* so far as the latter shall have exhausted the personal fund in discharge of his debt. Not that the simple contract creditors are entitled to have a larger fund for payment of their debts than they would have had originally (*e*); nor is the effect of this principle to prevent creditors by specialty from being paid in full, but to prevent them being paid to the prejudice of the simple contract creditors, who are, in contemplation of a court of equity, *bonâ fide* creditors, equally with those by special contract, notwithstanding their legal priority (*f*).

rendered almost nugatory by the 3 & 4 Will. IV. c. 104.

But, with regard to creditors, the question as to marshalling assets has lost much of its importance since the passing of the stat. 3 & 4 Will. IV. c. 104, as, by the operation of that Act, debts by simple contract have become completely available against real estates of a debtor, although it provides that specialty debts binding on the heir shall be first paid in full (*g*); and see 32 & 33 Vict. c. 46, *post*, p. 269.

The same process of marshalling is applied also to the cases of other claimants on the estate of deceased when some of them have more than one fund (parts of the estate) to resort to, and others have only one fund.

But no marshalling will be made in favour of charitable legacies so as in effect to appropriate for their benefit the pure personalty, which alone can be given to their use under the Statutes of Mortmain.

(*e*) Cradock *v.* Piper, 15 Sim. 304.
(*f*) Set. Or. 100; Aldrich *v.* Cooper, 8 Ves. 382.
(*g*) *Vide* 5 Jarm. & Sweet, 20.

Apportionment of a deficient fund between a tenant for life and a remainderman.

In Turner *v.* Newport (*h*), a question arose as to the apportionment of a deficient fund between a tenant for life and persons in remainder. It appeared that part of the testatrix's estate consisted of a debt on which a dividend only was obtained many years after her death. The court declared that the proper mode of apportioning the gross sum so recovered, between the tenant for life and those entitled in remainder, was to value the debt, having regard to the amount recovered and the time of recovery, at what it was worth if the debtor's estate had been administered a year after the testator's death, and to allow the tenant for life interest at £4 per cent. on such value for that time.

Order as to assets real and personal for payment of debts.

The usual order observed in the administration of real and personal assets for the payment of debts is (*i*):—

1. *Personal estates* not specifically bequeathed or otherwise exempted from the payment of debts: as legal assets.

2. *Lands expressly devised* for the payment of debts: as equitable assets.

3. *Descended estates:** as legal assets.

4. *Property devised and bequeathed to particular persons but charged* with the payment of debts: if lands, as equitable assets; but if personalty, as legal assets.

5. *General pecuniary legacies.*

6. *Lands included in a residuary devise.*

7. *Specific legacies and lands specifically devised or appointed and not charged* with debts: as legal assets.

The legal assets are applied, in a course of administration, in the payment of debts according to their legal priorities, the equitable assets being applied in the pay-

(*h*) 9 Law Times, 213. (*i*) Set. Dec. 317 *et seq.*

* It is a rule of law that every devisee of land is a purchaser. Galton *v.* Hancock, 2 Atk. 437.

CHAP. VII.

ment of debts *pari passu;* and, if the creditors are paid out of the personal estate, in payment of legatees *pro tanto.* And if insufficient to pay all the creditors, each creditor abates equally.

The personal estate is, as a rule, primarily liable to the payment of the debts and legacies of the deceased. But a testator may exonerate it by the express words or clear intention of his will; or he may create a mixed fund to arise out of the whole or part of his personalty and the conversion of the whole or part of his realty, and make such fund primarily liable. A debt also may be primarily a debt of the estate though further secured by a covenant of the testator, *e. g.*, a mortgage debt created by a predecessor of testator, or a jointure or charge fixed upon lands by the testator by the execution of a power to charge given to him in a settlement. And by 17 Vict. c. 113, in the case of a person dying after the 31st December, 1854, and whose will, if any, was not made before January 1st, 1855, possessed of an interest in land or hereditaments subject to a mortgage, the heir or devisee thereof (unless the deceased shall by his will, deed or other document have signified any contrary or other intention) shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of deceased; but the mortgaged estate shall, as between the persons claiming under deceased, be primarily liable to the mortgage debt, every part of such estate bearing a proportionate part of the debt—the mortgagee however retaining his rights against the whole estate of deceased as a creditor.

Whatever an administrator is entitled to recover *virtute officii* can never be equitable assets. The question whether assets are legal or equitable is not whether the money is recoverable through the agency of a court of law or a court of equity, but whether the personal repre-

sentative is entitled to recover them independently of any directions of the testator (*k*).

Order observed as to priority.

The usual order observed in the payment of debts in respect to their priority is,—1. Where the creditor holds a lien on the property, or is in the character of a mortgagee; 2. Claims due to the executors or administators, who are allowed to retain all debts due to them from the deceased against all other creditors of an equal degree; 3. Funeral expenses; 4. The expenses of obtaining the probate or letters of administration; 5. The costs incurred by the creditor instituting the suit for administering the assets of the deceased. Then follow, 6. The debts which, if the assets are legal, are paid according to their legal priority thus:—(1) Debts due to the crown, by record or specialty; (2) Judgments, decrees, recognizances, and statutes; (3) Until recently, debts by special contract, as on bonds or other instruments under seal; and, lastly, debts on simple contract, as on bills or notes and verbal promises, or such as are implied by law, and of which those due to the crown are to be first satisfied, a preference being also given to servants' and labourers' wages (*l*).

Legal priorities.

By the 32 & 33 Vict. c. 46, it is provided, "that in the administration of the estates of deceased persons dying after the 1st of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person,

(*k*) Per Lord Cranworth, Law T., vol. 3, N. S. 37, Att.-Gen. *v.* Brunning.

(*l*) Ayck. Ch. Prac. 360.

CHAP. VII.

whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding." But it is also provided that the Act shall not prejudice any lien, charge or other security which the creditor may be entitled to for the payment of his debt.

It will thus be seen that assets are divided into legal and equitable. The former are such as are recoverable in a court of law, and the latter are such as can only be recovered by a suit in equity.

Legal and equitable assets.

The distinction between *legal* and *equitable* assets was no doubt one of those principles arising *è foro conscientiæ*, and first introduced and enforced by clerical judges, who regarded all debts, whatever degree of priority might be allowed them according to the rules of law, to be nevertheless equally due in conscience, and payable *pro ratâ* according to the amount of the debt (*m*). Therefore, whenever recourse was had to the equitable tribunal for the sake of enforcing the payment of debts out of the fund in court, provided they were not secured by mortgage or lien, these debts, whether secured by bond or by simple contract, were payable *pari passu*, as being equally due in conscience; the assets to which recourse was thus had were called *equitable*. When, however, the suit was instituted to administer assets that could be reached by the creditors in a court of law (hence called *legal* assets), and the Court of Chancery was only had recourse to for the convenience of distribution, then the rule "*æquitas sequitur legem*" was applied, and the creditors might enjoy their rights according to their several priorities which the law gave them, as they did not apply to the Court of Chancery to establish any right in their favour,

(*m*) Woolstoncroft *v.* Long, 15 Car. II., 2 Freem. 175; 1 Ch. Cas. 32.

or to render any fund effectual by its own peculiar powers (*n*).

Vendor's lien on estate sold.

It has been before stated that a vendor has a lien upon the estate sold and conveyed by him, for the amount of purchase-money remaining unpaid (*ante*, p. 246). In such an event it has been determined, that if any purchaser devise the estate to one person, and also gives specific pecuniary legacies to others, and the general personal estate proves to be insufficient for paying the testator's debts, the specific legacies and real estate devised must contribute rateably in paying the purchase-money or the unpaid portion thereof (*o*); and this lien is not to be considered a mortgage, so as to come within 17 & 18 Vict. c. 113, above noticed, p. 268 (*p*).

Possessor of trust property, with notice, a trustee.

It is a general rule in equity that every person coming into possession of trust property, with notice of the trust, is to be considered as a trustee, and therefore bound, with respect to that property, to execute the trust (*q*); and this applies to a constructive trust, such as that raised by equity by way of vendor's lien.

Although the rules of equity with regard to trusts are not essentially such as regulate the decisions of a court of law, yet in the *construction* of words whereby trusts of real or personal estates are *limited*, whether by deed or will, equity has generally followed the law in regard to the creation and limitation of legal estates (*r*).

The Court of Chancery has no ori-

It has above (p. 173) been stated that the Court of Chancery has no original jurisdiction to try the validity of

(*n*) Spence, Eq. Juris. 584.

(*o*) *Vide* Gervis *v.* Gervis, 2 Jur., overruling Cornewall *v.* Cornewall, 12 Sim. 298; Tombs *v.* Roch, 2 Coll. 497.

(*p*) Hood *v.* Hood, 1857, Jur. 684; Set. 320.

(*q*) Daniels *v.* Davison, 16 Ves. 249; Adair *v.* Shaw, 1 Sch. & Lefr. 262.

(*r*) Duke of Norfolk's case, 3 Ch. Cas. 48; Bale *v.* Colman, 1 P. Wms. 143.

CHAP. VII.

ginal jurisdiction touching the validity of a will, except a trust can be raised.

a will, though it may try the question or cause it to be tried when the devisee comes into court to claim his equitable right to be protected against repeated ejectments at law, or where the point arises as incidental to some other equity, and provided the court of probate has not settled the point, if a will of personalty, by an ordinary probate (*s*); and, if a will of realty, by allowing probate in solemn form under the Acts 20 & 21 Vict. c. 77 and 21 & 22 Vict. c. 95 (*t*). But where a *trust* is created either by will or deed, it will be subject to the cognizance of a court of equity (*u*). And where fraud has been used to procure the insertion of particular provisions only in a will, or in obtaining the consent of the next of kin to probate, the court will entertain the matter and treat the executor as a constructive trustee for the next of kin (*x*).

Right of the court to construe a will.

Although, moreover, a document relating to personal property has been admitted to probate in the spiritual courts, and the court of equity is therefore bound to receive it as a testamentary paper, yet, having done so, this court takes upon itself to construe it; and therefore, in some cases under the circumstances, the court has found the paper wholly nugatory as an intelligible disposition of deceased's property, or to be invalid according to the law of a foreign country, (the domicil of testator,) in all which cases it operated only as the appointment of an executor to administer the property as under an intestacy (*y*).

Widow dowable out of a trust estate, by stat. 3 & 4 Will. IV.

Previous to the passing of the stat. 3 & 4 Will. IV., commonly called the Dower Act, a widow was not dowable out of a trust estate. One of the effects of that statute,

(*s*) Allen *v.* M'Pherson, 1 H. of L. Ca. 191.
(*t*) Hume *v.* Burton, 1 Ridg. P. C. 277.
(*u*) 1 Madd. 452.
(*x*) Story, § 440.
(*y*) Gawler *v.* Standerwick, 2 Cox, 15; 1 Jarm. Wills, 23.

however, was to give her the same right out of a trust estate as she has out of a legal estate: and the *cestui que* trust has the like power over the trust estate as the owner of a legal estate possesses; for the trustee possesses no power whatever over the trust estate but what is connected with the benefit of the *cestui que* trust.

Trust will not fail for want of a trustee.

It is a rule of equity that where a trust is once created it shall never fail for want of a trustee; therefore, if there be a devise of *real* estate in *trust*, but no person named who shall act as trustee, the court will constitute the *heir-at-law* a trustee: and in the case of a bequest of *personalty* it will consider the *personal representative* as a trustee (*z*); and where trustees disclaim or refuse to act, the execution of the trust will devolve on the court. The Court of Chancery will sometimes appoint a feme sole to be a trustee (*a*).

Unwilling trustee.

If a trustee, having been appointed, is unwilling to act, he should, previously to engaging in the trusteeship, execute a deed of disclaimer; otherwise, if he, upon being appointed by deed, accepts the trust, but afterwards refuses to act, the *cestui que* trust may compel such trustee, by a bill filed in equity against him, to perform the duties incident to that character; for having once acted in the trust, he cannot afterwards discharge himself from its obligations (*b*).

Merger of equitable into the legal estate.

It may be further observed that, whenever the legal and equitable estates unite together in the same person, the equitable estate will merge in that of the legal, and will no longer be subject to a court of equity; for a man cannot be trustee for himself. This doctrine, however, must not be understood without some restriction; it holds

(*z*) White *v.* White, 1 Bro. C. C. 12.
(*a*) *In re* Campbell's Trusts, 31 Beav. 176.
(*b*) Lewin on Trusts, c. 15 and 27.

CHAP. VII.

only where the legal and equitable estates are co-extensive and commensurate, and not where a person has the whole legal estate and only a partial equitable interest (*c*).

Trustees accountable for breach of trust.

Trustees will be held accountable to their *cestui que* trust for any breach of trust arising from negligence, malfeasance, or gross misapplication of the trust property; the court will also charge the representatives of trustees with the consequences of an abuse of trust, although they may have derived no benefit from it, and notwithstanding they had paid all his debts, of which they had any knowledge, out of the assets, and had distributed the whole surplus among his residuary legatees many years before, and at a time when they had no notice of the breach of trust or of any claim in respect of it (*d*); but where there has been no *mala fides* on the part of the trustee, the court will not deal severely with him upon slight grounds, and will therefore, in such a case, endeavour to discharge a trustee from any mischief that may arise from a misapplication of the trust money (*e*).*

It has generally been held that a simple bailee without hire, or a gratuitous depository, is not bound to take more care of property placed in his hands for safe custody than a prudent man would in regard to his own. This was the doctrine of the civilians, and under these views Lord Eldon (*f*) thought that trustees of a charity were not bound to look with more providence to the affairs of the charity than their own; but Lord Langdale lays down

(*c*) Bridges *v.* Bridges, 3 Ves. 125; Lewin on Trusts, 18; 6 Cruise's Dig. t. 39, s. 57 and 60, 4th ed.

(*d*) Knatchbull *v.* Fearnhead, 3 My. & Cr. 122; see Wedderburn *v.* Wedderburn, 2 Keen, 749; S. C. on appeal, 4 My. & Cr. 52.

(*e*) Trafford *v.* Boehm, 3 Atk. 444.

* See now 20 & 21 Vict. c. 54, "An Act to make better provision for the punishment of frauds committed by Trustees, Bankers, and other persons intrusted with property."

(*f*) Att.-Gen. *v.* Dixie, 13 Ves. 519, 534.

the rule with much greater stringency, and considered that far more was expected from trustees acting for a permanent charity than could be expected from the ordinary prudence of a man in dealings between himself and other persons; that a man acting for himself might indulge his own caprices, and consider what was convenient or agreeable to himself, as well as what was strictly prudent, and his prudential motives could not afterwards be separated from the others, which might have governed him; but that trustees of a charity, within the limits of their authority, whatever they might be, should be guided only by a desire to promote the lasting interest of the charity (*g*).

In a subsequent case (*h*) the same judge observed that there was necessarily a great difference between the dealing of an individual with his own property, and the dealing of a trustee with trust property; and that the trustee was not permitted to act as he pleased, or upon his own view of what was best; but that he was so to act as to be always prepared to show to the satisfaction of a court of equity that he had acted fairly and prudently in the administration of the trust and for the benefit of the *cestuis que* trust.

Executor discharged upon passing his accounts.

Where an executor passes his accounts in the Court of Chancery, he is discharged from further liability, and the creditor is left to his remedy against the legatees; but if he pay away the residue without passing his accounts in court he does it at his own risk (*i*).

But by 22 & 23 Vict. c. 35, s. 29, where an executor and administrator shall have given such notices for creditors and others to send in their claims as the court would direct to be given in an administration suit, he may dis-

(*g*) Att.-Gen. *v.* Kerr, 2 Beav. 420, 428.
(*h*) Att.-Gen. *v.* The South Sea Company, 4 Beav. 453, 458.
(*i*) Knatchbull *v.* Fearnhead, 3 My. & Cr. 126.

CHAP. VII.

tribute among the parties of whose claim he shall have notice, without being responsible if others come in afterwards.

Also, if an executor retain assets in his hands, and apply them for his own purposes, he will be held to pay interest thereon at four per cent. (*k*).

Whether a will revives a debt barred by the Statute of Limitations.

It was stated by Lord Mansfield, in a certain case (*l*), that the Statute of Limitations does not destroy a debt, but only takes away the remedy; therefore, where a testator by his will devises his real and personal estates charged with the payment of his debts, such a declaration was, upon the principles of equity, considered to have the effect of reviving a debt barred by the statute previous to the commencement of the suit (*m*), though it would not have that result where the statute had fully operated against the debt before the testator's decease (*n*). And in the case of Hughes *v.* Wynne (*o*), it was held that, when a testator has created a trust fund out of *real* estates for the payment of debts, the Statute of Limitations ceases to run from the death of the testator, upon the principle that, "it is not to be inferred that a man has no debt, because he does not go to law to enforce payment, when he has a trustee to pay him." But it has been lately decided in the House of Lords, in Scott *v.* Jones, upon appeal, that a debt, although not barred at the time of the testator's decease, may nevertheless become so afterwards, as to the executors and legatees, notwithstanding a charge or trust created by the testator of his debts upon his *personal* estate, because such liability is inherent to

(*k*) Hall *v.* Hallett, 1 Cox, 134.

(*l*) Quantock *v.* England, 5 Burr. 2628; 2 Bl. Rep., S. C.; *vide* also Courtney *v.* Williams, 6 Law Times, 518.

(*m*) Stackhouse *v.* Barnston, 10 Ves. 453; Jones *v.* Scott, 1 Russ. & My. 255.

(*n*) Burke *v.* Jones, 2 V. & B. 275.

(*o*) 1 Turn. & Rus. 307.

the estate and duty of the executor (*p*). This case was followed by Lord Cottenham in Freak *v.* Cranfeldt (*q*). But the executor may pay or retain a debt barred by the statute (*r*).

Trustee using trust property bound to account for all profits, but liable for all losses.

Where the trustee makes use of the trust property on his own account, the *cestui que* trust may compel him to refund the same with interest, or account to him for whatever profits he may have made. But should the speculations of the trustee turn out unfortunate, he is still liable to the *cestui que* trust for interest on the trust fund (*s*). So, if a trustee invests the trust money in a fund which the court does not adopt, and there happen to be a fall in the stocks, he must make good the deficiency (*t*); if, on the contrary, there arise any profit, it belongs to the *cestui que* trust; and it has been determined, upon the same principle, that if a trustee mix trust funds with his private moneys, and employs them both in an advantage of his own, the *cestui que* trust may, if he think fit, insist upon having a proportionate share of the profits instead of interest on the amount of the trust fund so employed (*u*).

Trustee or executor contracting with himself cannot spare himself.

A testator directed his executors to lay out the residue of his estate in the purchase of land, or upon heritable or personal security, at *such rate of interest* as they should think reasonable. The executors lent the fund to one of themselves upon bond at four per cent., at a time when five per cent. might have been made by heritable or government security. Although it was admitted that the discretion given to the executors by the testator might

(*p*) 4 Cla. & Fin. 4, 382.
(*q*) 3 My. & Cr. 499; and see Moore *v.* Petchell, 22 Beav. 172.
(*r*) Stahlschmidt *v.* Lett, 1 S. & G. 415.
(*s*) Bro. C. C. 198; Massey *v.* Davis, 2 Ves. jun. 320.
(*t*) Phayre *v.* Perce, House of Lords, 3 Dow. 128.
(*u*) Docker *v.* Somes, 2 My. & K. 655.

CHAP. VII.

have been soundly exercised by their lending the money to any other person, upon such terms as they thought reasonable, and that they really did imagine they were going as near as possible to the testator's intention when they did thus lend the money, the court held *that, whenever a trustee contracts with himself he cannot spare himself;* and there was no one more sacred rule of a court of equity, than that a trustee cannot so execute a trust as to have the least benefit from it himself, and therefore compelled the borrowing executor to pay interest at the rate of five per cent. for the money in his hands (*x*). But the trustee may relieve himself from all liability by laying out the trust money in the Reduced Bank Annuities, or Three per Cent. Consols, which were the funds the court formerly adopted; but now, under 22 & 23 Vict. c. 35, s. 32, 23 & 24 Vict. c. 38, s. 10, and 30 & 31 Vict. c. 132 and Order, Feb. 1, 1861, much more extended powers of investment are given to trustees (*y*). A trustee should, therefore, for his own security, endeavour to adhere to the tenor of his trust as closely as possible; for, as the office of a trustee, as well as an executor or administrator, is considered honorary, they are allowed no remuneration for care and trouble, unless it be especially provided for in the deed or will creating the trust: and it has been determined that an executor will receive no allowance for his management, time and labour, expended in carrying on a business after a testator's death (*z*); but persons holding the situation of trustees will be allowed all fair and honest expenses incurred in executing the purposes of the trust (*a*). The court will, for the sake of

(*x*) Forbes *v.* Ross, 2 Cox, 133.

(*y*) Holland *v.* Hughes, 16 Ves. 111.

(*z*) Burden *v.* Burden, 1 V. & B. 170; Christophers *v.* White, 1 Beav. 523; Marshall *v.* Holloway, 2 Swan. 453.

(*a*) Burge *v.* Brutton, 2 Hare, 373.

the public, extend its full protection to trustees in the exercise of every reasonable precaution, and requiring full proof of the title of parties urging their claims under the trust. But if, after having received full evidence of such title, a trustee shall perseveringly persist in withholding the fund from the party to whom it really belongs upon grounds which wholly fail, and especially where a part of those grounds is a claim in which that trustee is himself interested, the court will not, upon the same rules, allow the trustee so to conduct himself, without paying the costs of such a mode of proceeding (*b*).

Divers ameliorations have been made by statute in the laws relating to trusts.

First, by the 10 & 11 Vict. c. 96 (22nd July, 1847), amended by 12 & 13 Vict. c. 74 (28th July, 1841); the corresponding Act for Ireland being the 11 & 12 Vict. c. 28 (31st August, 1848).

These are called the TRUSTEE RELIEF ACTS. The great facilities hereby afforded to trustees for relieving themselves from their responsibilities will frequently be an inducement for them to take advantage of the provisions contained in the above-mentioned Acts, whenever they are in doubt as to the extent of their duties, either arising from the state of the property with which they are invested in their fiduciary character, or the dubious and conflicting interests of those claiming the benefit of the trust; and this, without rendering it imperative upon them, should they think fit to proceed by a regular suit or otherwise. By simply lodging the fund in the Court of Chancery, the trustees may relieve themselves of all further responsibility, wash their hands of the trust, and leave the several claimants to settle their disputes with the court as they best may, in respect to the fund itself,

(*b*) Froste *v.* Hamilton, V.-C. Knt. Bruce's Court, May 3, 1842, MSS.

CHAP. VII.

which now becomes subject to the administration of the court. The Act provides that all trustees, executors, administrators, or other persons having in their hands any money belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit (*vide* 41 Cons. Or. r. 1), shortly describing the trust and the instrument creating it according to the best of their knowledge and belief, the amount of money, &c., the names of the persons interested, the names and addresses of the trustees and where they may be served, and a submission to answer all inquiries directed by the Court, to pay the same with the privity of the Accountant-General of the High Court of Chancery in the matter of the particular trust (describing the facts as accurately as may be), in trust to attend the orders of the court; and further, that annuities or stocks in any Government or Parliamentary securities, or of the East India or South Sea Companies, may also in like manner be transferred in the name of the Accountant-General, in trust to attend the orders of the court, and that the receipt of one of the cashiers of the bank, or the certificate of the proper officer of such transfer or deposit, shall be a sufficient discharge to the trustees for the money or securities so lodged or transferred. The money being paid in under the provisions of the Act "in trust to attend the orders of the Court," it becomes subject to the general jurisdiction of the court. This includes a power to order the payment of the costs (*c*).

The 12 & 13 Vict. c. 74, "An Act for the further Relief of Trustees," merely supplies an omission in the former Act by providing that if on any petition presented in the matter of that Act, it shall appear to the judge of

(*c*) *Re* Woodburn's Will, 1 De G. & J. 351; *Re* Armston's Trusts, 1 Jur., N. S. 715.

the Court of Chancery before whom such petition shall be heard, that any money, annuities, stocks or securities are vested in any persons as trustees, executors, &c., or otherwise upon trusts within the meaning of the Act, and that the *major part of such persons* are desirous of lodging them, but that for any reason the concurrence of the other or others of them cannot be had, the courts may order the lodgment to be made by the major part of such persons without the concurrence of the other or others of them; and every lodgment so made is to be as valid and effectual as if the same had been made on the authority or by the act of *all* the persons entitled to such moneys, annuities, etc.

The Court may then make orders upon petition, without the institution of a suit by bill, for the application of these trust funds and administration of the trusts (*d*).

There are also the Orders, 12th November, 1856, Cons. Ord. 35, by which applications, under the "Trustee Relief Acts," where the trust fund does not exceed the sum of £300 in cash or £300 stock, are to be made at chambers.

Secondly, by THE TRUSTEE ACT, 13 & 14 Vict. c. 60 (5th August, 1850), which abolishes 11 Geo. IV. & 1 Will. IV. c. 60, the 4 & 5 Will. IV. c. 23, and 1 & 2 Vict. c. 69. Its object was "to consolidate and amend the laws relating to the conveyance and transfer of real and personal property vested in mortgagees and trustees, and for enabling courts of equity to give effect to their decrees and orders in certain cases." "The first object of the Act," says Mr. Headlam in his Introduction, "is to extend the subject-matter to which the summary jurisdiction of Chancery may be applied, and the next to increase

(*d*) See Morg. Ord. 71-2, as to the exceptional cases when a bill would be necessary to settle questions arising.

CHAP. VII.

the number of contingencies upon which these summary powers may be exercised." The former Acts so repealed, though giving such summary powers to some extent, did not embrace funds belonging to Joint Stock Companies. Under this Act also provision is made in respect to contingent rights in lands and *choses in action* as to personalty.

By this Act and "The Trustee Extension Act, 1852," powers are given, in the case of lunatics, or persons of unsound mind not found lunatic, to the lord chancellor or lords justices acting in lunacy, and in other cases to the Court of Chancery, to vest or effect the transfer or release of lands and contingent interests therein, stocks and choses in action held upon trust by persons found lunatic, or of unsound mind and not found lunatic, infants, out of the jurisdiction, or as to whom it is uncertain whether they be living or dead, or who have died being intestate and without an heir, or it is uncertain who is the heir or devisee, or of contingent interests in lands which would vest in unborn persons on their coming into existence upon trust, or where the trustee refuses to convey or transfer—and powers also to appoint new trustees whenever it shall be found inexpedient, difficult or impracticable so to do without the assistance of the court, or in lieu of persons convicted of felony, or where there is no existing trustee. These things may be done upon petition, but in some cases a bill is necessary.

The personal representative of a deceased person, in whose sole name stock is standing, is treated as a trustee, and so, where a decree is made in equity directing the sale of lands of a deceased person, is every person seised, possessed of or entitled to such lands; and also where a decree is made for specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or any decree for the conveyance or assignment of

any lands, power is given to declare persons trustees and effect a transfer. Applications in these latter cases must under Ord. 35 be made in chambers. Some other like facilities for transfer of mortgaged estates and other purposes are given by these Acts.

These Acts, it is to be observed, are intended to be confined to estates held upon trust or mortgage, and do not repeal the statute 11 Geo. IV. & 1 Will. IV. c. 65, which gives the Court of Chancery and the lord chancellor power over estates in which lunatics and other persons under legal disabilities are *beneficially* interested. Neither do they repeal the 1 Will. IV. c. 47, the Act for the payment of debts out of real estates, nor the 2 & 3 Vict. c. 60, or the 11 & 12 Vict. c. 87, consolidating and amending 1 Will. IV. c. 47, because, although these Acts give a simpler process for several of the objects provided for by those statutes, yet there seems no substantial objection to an option being left of proceeding either under this Act or under those statutes. Moreover the repeal and re-enactment of several of the clauses contained in those statutes would have materially increased the length of these Acts.

By 35 Cons. Or. r. 1, arts. 4 and 5, applications on behalf of infants under the 12th, 16th and 17th sections of the 1 Will. IV. c. 65, are also to be made at chambers.

Also, under the 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74, in all cases where the trust fund does not exceed 300*l.* cash or 300*l.* stock (35 Cons. Or. r. 1, art. 3).*

Execution creditor made trustee.

If the creditor of a trustee take the property or goods which form the subject of trust into execution, the court will convert such creditor himself into a trustee (*e*).

* See *Re* Bloomar (a lunatic), 30 L. T. 239; Trustee Act of 1850; The Lunatic Regulation Act of 1853.

(*e*) Foley *v.* Burnell and another, 1 Bro. C. C. 274.

CHAP. VII.

Difference as to liability of executors and trustees.

There is a difference between the amount of liability of executors and trustees in respect of their joint receipts; for it has been said that, if two executors join in giving a discharge for money, they are both accountable, though only one actually received it (*f*). But if two trustees join in a receipt or conveyance, and one receive the money, only the receiving trustee shall be charged, because the other joined purely for the sake of conformity (*g*); whereas, in the case of executors, as one executor alone might give a discharge, the joining of the other is an unnecessary act, with which he might refuse to comply. This distinction seems to be based upon the different powers and interests which trustees and executors are invested with in their respective estates. Thus executors have a joint and several interest, whilst trustees have only a joint interest and authority, and must therefore all join in conveying and also in giving receipts. Indeed, Lord Harcourt, C., held that two executors joining in a receipt, and one only receiving the money, they are both liable in the case of a creditor, but not to legatees (*h*); but Lord Thurlow, in adverting to the last-mentioned case, says, "The distinction that a creditor shall have a right to charge an executor, and a legatee not, seemed to him to be an odd one (*i*); that in a late case (*k*), the rule is confirmed that trustees shall not be chargeable, but executors shall." His lordship then proceeded to state that the only case to the contrary was the one of Westley *v.* Clarke and Betts, in which there were peculiar circumstances, but that he much questioned the decision.

Fellows *v.* Mitchell.

The circumstances of this case, as stated in a foot-note

(*f*) *Ex parte* Belcher; *Ex parte* Parson, Amb. 219.
(*g*) Fellows *v.* Mitchell, 1 P. Wms. 81.
(*h*) Churchill *v.* Lady Hobson, ibid. 242.
(*i*) Sadler *v.* Hobbs, 2 Bro. 116.
(*k*) Leigh *v.* Barry, 3 Atk. 584.

to Fellows *v.* Mitchell and Owen, were the following :— M. Smith, by his will, gave the two plaintiffs legacies of 300*l.* and 100*l.*, and the residue of his personal estate to his widow, and appointed Clarke, Betts, and Thompson his executors, with a clause that one of his executors should not be answerable for the acts of the others. The testator died on the 22nd of June, 1755. Part of his estate, to the amount of 600*l.*, was at the time of his death out on mortgage. Thompson, who was an attorney, after the testator's death, called in the mortgage and *received the money*, and *afterwards* sent his clerk with the assignment of the mortgage to his two co-executors, who executed the same, and signed the receipt indorsed thereon. Thompson became a bankrupt on the 27th day of July, 1756, without having accounted for the money ; and the plaintiffs, the legatees, filed their bill to charge Clarke and Betts with this money received by Thompson.

On the hearing of the cause, Lord Northington thus alluded to the doctrine which had then obtained in the court: "This claim is founded on the notion of a general rule having been established in this court, that where executors join in a receipt, they themselves are all liable *in solido*, because their joining is unnecessary : and that a different rule has been established with respect to trustees who join in receipts, namely, that they are not answerable *in solido*, but in proportion only to what they receive."

Practice of the court in more modern times as to liability of trustees.

The courts have, in more modern times, inclined to moderate the rule in certain cases, where one executor has joined with his co-executors in giving a receipt, and have held that, if he can prove that he was not present when the money was paid, and that he never had any control over it, he shall not be liable for the loss (*l*). But

(*l*) Brice *v.* Stokes, 11 Ves. 324; Wms. Exec. 1125-27; Matt. Exec. 313, 2nd ed.

CHAP. VII.

after the judgment of Lord Cottenham, in the case of Knatchbull *v.* Fearnhead (*m*), already referred to, executors would be but ill-advised to tamper with the rules relating to their responsibilities, under any circumstances whatever.

"Several executors are regarded as an individual person, and have a joint and entire interest in the testator's property; and hence the lease of one of several executors is as efficacious as their joint demise, although it purport to be the grant of all. In this respect their interest differs from that of joint-tenants, or tenants in common; the grant of one of several joint-tenants or tenants in common operating only on the share of the granting party" (*n*).

Before the passing of the 22 & 23 Vict. c. 35 (Lord St. Leonards' "Act to amend the Law of Property and to relieve Trustees"), purchasers from trustees for sale, unless they were expressly or impliedly exonerated by the instrument empowering the trustees to sell, were generally liable to see to the application of the purchase-money; but the 23rd section of the Act provides that the receipt of such trustees shall discharge a *bonâ fide* purchaser from liability, although there be no such clause in the deed creating the trust, unless the contrary shall be expressly declared by such deed.

By this same statute, 22 & 23 Vict. c. 35, devisees in trust and executors have powers to raise money by sale or mortgage of realty for payment of debts. Provisions

(*m*) 3 My. & Cr. 126; also Clough *v.* Bond, ibid. 496; Spence, vol. 2, pp. 933, 934. See the modern cases, Trutch *v.* Lamprell, 20 Beav. 116; Rebden *v.* Wesley, 29 Beav. 213; Cowell *v.* Gatcombe, 27 Beav. 568; Griffiths *v.* Porter, 25 Beav. 236; Horton *v.* Brocklehurst, 29 Beav. 504; Mendes *v.* Guedalla, 2 Johnst. & Hare, 259; Eaves *v.* Hickson, 30 Beav. 136.

(*n*) Platt on Leases, vol. 1, p. 367.

are made for the protection of trustees and executors acting *bonâ fide* in the distribution of trust funds, the executors being among other things authorized to give public notices for creditors as in Chancery, and to distribute according to the result without incurring any liability therefrom. Trustees and executors can apply to the court summarily for its opinion and advice, and may act thereon with impunity. Every deed, will or other instrument creating a trust expressly or by implication is to be deemed to contain clauses for the indemnity and reimbursement of the trustees.

By "The Law of Property further Amendment Act," 23 & 24 Vict. c. 38, s. 14, executors and administrators may apply by summons for an order to take an account of the debts and liabilities of the deceased, and to suspend in the meantime all actions against such personal representatives.

By "The Trustees and Mortgagees Act," 23 & 24 Vict. c. 145, trustees empowered to sell may sell and convey and apply the purchase-moneys in accordance with terms set out, and which are those usually inserted in well-drawn instruments. They may renew reasonable leaseholds. They may apply income of an infant's absolute or contingent share for his maintenance and education in the way usually provided. There is no power of advancement. There is a power in the usual terms to appoint new trustees, and also a power for executors to compound and settle claims. And there is a general power to give valid receipts for any moneys payable to trustees under their trusts.

The 24 & 25 Vict. c. 96, s. 80, makes trustees, fraudulently disposing of trust property, guilty of a misdemeanor.

Removal of trustee.

When, from circumstances, it is deemed fit to remove a trustee, the proper course is either to file a bill in equity

for that purpose; or it may be done, and a new trustee appointed, by means of a petition under the Trustee Acts above referred to, where the old trustee concurs in or consents to be removed from the trusts, and the trust fund exceeds 300*l.* in cash, or 300*l.* stock. Should however the amount of cash or stock not be more than 300*l.* respectively, then, by an order of court, 12th of November, 1856, application must be made before the master of the rolls or the vice-chancellor respectively, while sitting at chambers. This application is made under the 10 & 11 Vict. c. 96, "The Trustee Relief Act," and the 12 & 13 Vict., "An Act for further Relief of Trustees."

Under the 15 & 16 Vict. c. 86, ss. 45—47, a decree for the administration of the estate of a deceased person may, in most cases, be expeditiously and cheaply obtained under an application by summons, heard and decided in chambers. An executor however cannot initiate proceedings in this way.

PART III.

CHAPTER I.

BY AND AGAINST WHOM A SUIT MAY BE INSTITUTED.

Solicitor to take a special authority from his client before suit.

BEFORE commencing proceedings in a court of chancery, the solicitor should be careful to obtain a special authority from his client to institute the suit; and although such authority may be by *parol* (*a*), yet, according to the strict rules of practice, there ought to be a warrant in *writing* for that purpose: if such precaution be dispensed with, it is at the peril of the solicitor (*b*); for should the authority be afterwards disputed by the client, the *onus probandi* will lie on the solicitor. In the case of Wright *v.* Castle (*c*), Lord Eldon stated that there must be a special authority to institute, although a general authority is sufficient to enable the solicitor to defend a suit. "It is settled," said his Lordship, "that if the plaintiff denies, and the solicitor asserts, authority to have been given, and there is nothing but assertion against assertion, the court will say that the solicitor ought to have secured himself by having an authority in writing, and that, not having done so, he must abide the consequences of his neglect."

(*a*) Lord *v.* Kellett, 2 My. & K. 1.
(*b*) Tabbernor *v.* Tabbernor, 2 K. 680.
(*c*) 3 Meriv. 12.

CHAP. I.

And it has even been decided that, if a solicitor relies upon a written retainer as an authority for instituting a suit in this court, the retainer ought explicitly and clearly to state such object, otherwise the bill must be taken off the file on the same terms as in Allen *v.* Bone (*d*), viz. to have the bill dismissed, with costs, as between solicitor and client, to be paid by the solicitor, and the like costs as to the motion to dismiss (*e*).

Bill,—first step in chancery.

The first process, on behalf of a subject merely, in a court of chancery, is ordinarily by preferring a bill in the nature of a *petition* or complaint. It is addressed to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal, as the case may be; should the person who holds the seal be a party, or the seal happen to be in the Queen's hands, the bill is addressed to the Queen herself in her Court of Chancery. Divers matters may now however, as we have seen, be brought before the Court by petition or summons in a more summary way.

Suits on behalf of the crown.

Suits on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection, as objects of a public charity (idiots, lunatics), are instituted by the attorney or solicitor-general (*f*). And where there are conflicting claims between the sovereign and persons partaking of his or her prerogative, or under his or her peculiar protection, the crown, as plaintiff, may be represented by the attorney-general, and, as defendant, by the solicitor-general (*g*). The bill ex-

(*d*) 4 Beav. 408.

(*e*) Atkinson *v.* Abbott, 25 L. T. 314. The above, as to retainers, seems to be still law; see later cases, Dru. 289, 290.

(*f*) Mitf. Tr. Pl. But see the Charitable Trusts Acts, 1853, 1855 and 1860, as to more summary proceedings in some cases, and as to when the consent of the charity commissioners is requisite.

(*g*) Attorney-General *v.* Mayor of Bristol, 3 Madd. 319; S. C., Jac. & W. 294; Attorney-General *v.* Vivian, 1 Russ. 226.

hibited by the attorney or solicitor-general, as they merely exercise their office officially, is not by way of petition, but of *information* to the court respecting the rights of the crown, which it claims for itself, or those who are under its immediate protection, and the violation or detention of those rights (*h*). When the subject matter of the information does not immediately affect the interests of the crown, as well also as in some cases concerning it, the proceedings are carried on in the name and under the direction of a relator, who is answerable for the propriety and conduct of the suit; and for this cause neither a *feme covert*, an infant, nor an idiot can be a relator. If the relator should himself have a personal interest in the matter of complaint, as well as the crown, the proceedings form together that which is denominated *Information and Bill*.

Information.

Information and bill.

Bodies politic and corporate, and all persons not partaking of the prerogative of the crown, sue either by themselves or by others; persons of full age, not being married women, idiots, or lunatics, may file a bill by themselves alone. A corporation may also sue and be sued in the name of its head alone, if so authorized by its charter or the Act of Parliament constituting it. And individual members and officers of a corporation may be made defendants jointly with it for the purpose of obtaining a discovery. A *feme covert*, provided she is in such a condition as to be by law considered a *feme sole*, may sue in her own name, as where her husband is banished or has abjured the realm, or she has been judicially separated from her husband, or has obtained a protection

Ordinary method of suing, in relation to parties.

Feme covert.

(*h*) As to the Queen Consort, see Bl. Com. i. 220; and as to the Prince of Wales and Duke of Cornwall, see Attorney-General *v.* St. Aubyn, Wightw. 178; Attorney-General *v.* Lamb, 11 Beav. 213; Wightw. 255, 256; Dan. Ch. Pr. 18; but see Platt on Lea. i. 216—218.

CHAP. I.

order under late statutes. If the suit relates to her separate estate she must sue by her next friend, and her husband must be party generally as a defendant, though in some cases he has been allowed to be joined as a co-plaintiff (*i*). And, generally, a married woman having interests in opposition to those claimed by her husband, must sue by her *next friend*. A suit on behalf of the rights of a married woman is usually instituted by herself and her husband jointly. Where however it appeared that the woman was living separate from her husband, who was not in a position to support her, and that she had no property except that which she claimed in the suit, she was allowed to sue *in formâ pauperis*, in respect of her separate estate, without the necessity of having a next friend appointed (*k*). An infant also must sue by his next friend. When a bill has been filed on behalf of an infant by his next friend, he may, on his coming of age, abandon the suit upon paying the costs; but he cannot, unless it appear that the bill was improperly filed, compel the *prochein ami*, or next friend, to pay the costs; and for this reason, if the infant, as soon as he comes of age, repudiates the suit, it is not necessary to apply to the court to have the bill dismissed; but the proper course would be to apply in some summary way, in order to call upon the plaintiff's solicitor not to take any other step in the cause; and if the solicitor proceed after such notice, the plaintiff, the late infant, may make an application to stay all proceedings in the cause (*l*). Idiots and lunatics exhibit their bills by the committees

(*i*) Dan. Ch. Pr. 90, 718. A bill cannot be filed in the name of a married woman without her consent, Pennington *v.* Alwin, 1 S. & S. 264.

(*k*) *Re* Page, 20 L. T. 243; Wellesley *v.* Wellesley, 16 Sim. 1.

(*l*) 4 Madd. 461; Boschetti *v.* Powell, L. Ch. C.; 5 Law Times, 301.

of their estates, who must also be parties. If there is no committee, the suit must be by the next friend.

English bill.

A suit in a court of chancery is usually denominated proceedings by *English bill*,* a term made use of formerly to distinguish it from suits within the ordinary jurisdiction of the court as a court of common law, where, as in the other courts of law, proceedings used to be, in more ancient times, since the Conquest, entered and enrolled in the French and Norman languages, and afterwards in the Latin (*m*), until the statute 4 Geo. II. c. 26, which finally determined that the proceedings at law should be done into English, from which period the race of black-letter lawyers began visibly to decline.

Generally, all persons capable of commencing suit may, in like manner, defend.

Generally speaking, all persons who are capable of commencing suits may also be made defendants under the like restrictions; for instance, bodies politic and corporate, and persons of full age, not being idiots, lunatics, or married woman, may defend a suit by themselves. As a *feme covert* usually sues jointly with her husband, so she must, where her interests are the subject of the suit, be made a defendant jointly with him; but if she claim any interest therein in opposition to the demands of her husband, the court, upon application, will order that she may be allowed to defend the suit separately from her husband. But at law, where the cause of action would survive to the wife, she must sue jointly with her husband, although, if the cause of action should arise during the coverture, the husband sometimes brings the action in his own name, or in the joint names of himself and wife (*n*).

* The period when proceedings in *Chancery* became distinguished as by "English Bill," was about the reign of Henry V., Dodd *v.* Browning, 1 Cal. 13.

(*m*) 36 Edw. III.; Bl. b. iii. c. 21.

(*n*) Com. Dig. tit. "Baron and Feme," V. & X.; 2 Chit. Arch. 895, 7th ed.; Dunstan *v.* Burrell, 1 Wils. 224.

CHAP. I.

Infants defend by guardian.

There is, however, an exception made in respect of an infant defendant. We have observed that he sues by his *prochein ami*, or next friend; but he defends by guardian, who is usually, though not necessarily, the nearest relative who does not claim any interest in opposition to that of the infant. If the infant reside within twenty miles of London, the guardian is appointed by the court. If he reside beyond that distance, the guardian is appointed by commission. In the case of an idiot or lunatic, the court will appoint the committee to be guardian *ad litem*, unless his interests are adverse to those of the idiot or lunatic; for in that case another person will be appointed guardian to defend the suit. If the bill do not state the defendant to be found an idiot or lunatic by inquisition, the court will require an affidavit or other evidence showing the state of mind of the defendant, before it will permit him to defend by guardian. When the crown is in possession of that which the suit seeks to divest, or where the rights claimed by the crown are the sole object of the suit, the application must be made to the king by petition of right, upon which the crown may refer it to the chancellor to do right, and direct that his attorney-general shall be made a party for that purpose: the Queen is entitled to the same prerogative.

Effect of late Municipal Corporation Act.

It has been stated that bodies politic and corporations may file a bill by themselves, or by others; but the late Municipal Corporation Act (*o*), having affixed a public trust upon and made available for public purposes that which before was mere corporate property, capable of alienation according to the uncontrolled will and pleasure of the body corporate, that Act has in a certain measure changed the form of the remedy. It was therefore held, in the case of the Attorney-General *v.* Wilson (*p*), "that, as corporate property is now applicable to public pur-

Attorney-General *v.* Wilson.

(*o*) 5 & 6 Will. IV. c. 76. (*p*) 9 Sim. 49.

poses, it may be right that, in all future instances, the attorney-general should sue in conjunction with the corporation."

The 7 Will. 4 & 1 Vict. c. 73, enables her Majesty to grant letters-patents establishing companies and providing that they shall be able to sue and be sued by their public officer; and many joint-stock companies or associations for insurance, trading, &c. have from time to time been established by special Acts of Parliament, which, although not formed into corporations, have been thereby endowed with many privileges which have rendered them as though they had acquired something of a corporate capacity—as, for instance, their being capable of suing and being sued in the name of their public officer. But although it is competent for a company thus formed to institute legal proceedings in the names of the officers designated by the Acts; yet where any of the company are desirous of suing the directors or others who are members of the company, they may sue in their own individual capacities. Thus they are empowered either to sue by themselves and make the rest of the company defendants, or of suing on behalf of themselves and the other members of the association (*q*).

It has also been determined by virtue of the Joint-Stock Banking Act, 7 Geo. 4, c. 46, s. 9, that the public officer may institute proceedings against certain of the directors in reference to past transactions to compel them to refund sums alleged to be due from them to the partnership (*r*).

It will be sufficient to observe that the intervening Acts relating to joint-stock companies, their constitution and management have been repealed, but are now conso-

(*q*) Hitchens *v.* Congreve, 4 Russ. 562.
(*r*) Harrison *v.* Brown, 5 De G. & Smale.

CHAP. I.

lidated and re-enacted by the Companies Act (25 & 26 Vict. c. 89), 1862.

A company constituted under this and all former Acts relating to such associations became and still become, upon certificate of incorporation, a body corporate by the name prescribed in the memorandum of association, and may thenceforth exercise all the functions of an incorporated company, having a perpetual succession and a common seal (sect. 18).

An alien, if not an alien enemy, can now sue in the courts of this country, provided that the demand be a mere personal one, or one which arises out of the rights which aliens can hold under the Alien Act (7 & 8 Vict. c. 66). An outlaw in a civil suit cannot sue, nor can a person attainted for felony, nor a person convicted of a felony not capital, during the term of his sentence or until pardon. Bankrupts also are incapable of suing to some extent, because their property has become vested in the assignees.

CHAPTER II.

OF THE BILL—RECEIVER—WRIT OF NE EXEAT REGNO.

A BILL in Chancery was formerly divided into nine parts —1. The address; 2. The parties; 3. The plaintiff's case or stating part; 4. The charge of confederacy; 5. The pretence and charge; 6. The part which gives jurisdiction; 7. The interrogatory part; 8. The prayer for relief; 9. The prayer for issuing process. But the bill is now made to assume a twofold division only; namely, the statement or a narrative of the plaintiff's case upon which rests his equity and the prayer for relief.* Different parts of a bill.

And whenever the plaintiff sought to obtain the special order of the court, or a provisional writ, it was necessary to insert in the bill, next before the prayer of process, a prayer for the order or particular writ which the case required (*a*), and the bill was generally named after the writ itself, as an injunction-bill, or a bill for a writ of *ne exeat regno* (*b*). But now, since by the 15 & 16 Vict. c. 86, s. 10, every bill of complaint (under which term is included also an information) to be filed in the court, as a bill in Chancery, frequently contains a prayer for a receiver, where the property in dispute may be injured from neglect, or a writ of *ne exeat regno* when the plaintiff's demand may be endangered by the defendant going abroad, it may be advisable in this place to say something on both subjects. The bill must always be drawn or settled by counsel from Prayer for subpœna.

* Vide *infra*, "Answer."

(*a*) Wood *v.* Beadell, 3 Sim. 273. (*b*) Mitf. 47.

CHAP. II.

instructions furnished him by the plaintiff's solicitor. It also requires the signature of counsel previous to its being filed, who in strictness is responsible for anything scandalous or impertinent contained therein. The bill was formerly, upon being prepared, engrossed in words at full length on skins of parchment, with counsel's signature copied at the end. But by the 1st section of the 15 & 16 Vict. c. 86, the practice of engrossing on parchment bills of complaint to be filed in the court, and of filing such engrossment, shall be discontinued; and the clerk of the records and writs shall receive and file a printed bill of complaint in lieu of an engrossment, in like manner as they now receive and file such engrossment. But section 6 provides that the clerk of records and writs may receive and file a written copy of any bill of complaint, praying a writ of injunction or a writ of *ne exeat regno*, or filed for the purpose of making an infant a ward of court, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy of such bill within fourteen days; and upon its being served on any defendant thereto, such service shall have the same effect as the service of a printed copy. Section 7 binds the plaintiff to deliver to the defendant or his solicitor, upon application, such a number of printed copies of his bill of complaint as he shall have occasion for, upon being paid for them at such rate as shall be prescribed by any general order of the lord chancellor.* The above provisions, as to filing and delivering printed bills, shall be applicable to the same, as amended—sect. 8.

Receiver, under what circumstances appointed.

When a bill is about to be filed against an executor or administrator who is committing a *devastavit*, or where there is a suit between the representatives of co-partners

* By Ord. 6, 1st set, 7th August, 1852, and 9 Con. Ord. r. 5, confined to ten printed copies.

in trade, or if an infant be entitled to a real estate and require the protection of the court, it is usual, and for the most part expedient, to apply to the court for a receiver: but, in the case of an executor, a receiver will not be appointed unless there be a manifest breach of trust by wasting the property, and this not from a single act only, but a habitual and speculative course of dealing, bringing the property into danger, in which event the court will treat the executor or administrator as a trustee (*c*); nor will a receiver be allowed where one of several partners survives, by reason of the confidence reposed in him (*d*). In the case of partnership affairs, or where an executor is wasting the assets of the testator, a receiver is sometimes allowed upon affidavit before answer (*e*); but usually the application is not made until the defendant has answered, and in the case even of an infant there must be a cause depending (*f*). A receiver is considered as an officer of the court, which, upon being satisfied of the necessity of his appointment, will make the order accordingly, upon such person giving security (Ord. 13, Oct. 16th, 1852; 24 Con. Ord. r. 1). A receiver will be appointed in most cases, even before answer, upon sufficient affidavits, when, through fraud or mismanagement, the property in dispute would be wasted or misapplied unless taken under the protection of the court (*g*).

Receiver.

A receiver, under which term may be included consignee and manager (Preliminary Con. Ord. r. 10 (7)), is an indifferent person between the parties in the cause. He is appointed by the court for the purposes hereafter

(*c*) Middleton *v.* Dodswell, 13 Ves. 268.

(*d*) Philips *v.* Atkinson, 2 Bro. C. C. 272.

(*e*) 13 Ves. 268; Vann *v.* Barnett, 2 Bro. C. C. 158; Tanfield *v.* Irvine, 2 Russ. 149.

(*f*) 1 Atk. 489.

(*g*) 2 Bro. C. C. 158.

CHAP. II.

mentioned, when it does not appear reasonable that either party should be so (*h*). But the court will not appoint a receiver when no suit is pending, unless in the case of idiots or lunatics (*i*). Also, if the court see fit, it will allow a receiver in an infant's suit, whether prayed for by the bill or not (*j*).

Difference in the appointment.

There is a difference as to the office and authority of a receiver, whether appointed by, and acting under, the direction of the court, or whether he be appointed by deed; if by the latter, he can only act within the scope and limits prescribed by that instrument wherein his power is clearly defined. If he derive his authority as an officer of the court, he is invested with certain powers which our laws of tenures are unable to confer upon individuals.

Sureties given by a receiver.

Before a person can be appointed a receiver, he must enter into his recognizance with two sureties for the proper performance of his office, who, in general, will not be discharged until their principal has passed his accounts.

When the order is made directing such appointment, the security is to be allowed by the judge to whose court the cause is attached and taken before a person authorized to administer oaths in chancery, duly to account for what he shall receive on account of the rents and profits for the receipt of which he is to be appointed, at such periods as the judge shall appoint, and to account for and pay the same as the court shall direct or as the case may be, to be answerable for what he shall receive in respect of the personal estate, and to pay the same as the court shall direct. He is to be allowed a proper salary for his pains in receiving such rents and profits,

(*h*) Wyatt's P. R. 355.
(*i*) Wyatt's P. R. 356.
(*j*) Simpson *v.* Gutteridge, 1 Turn. C. P. 448.

or, as the case may be, he shall have an allowance for collecting the same (Ord. 13, Oct. 16th 1852; 24th Cons. Ord. r. 1).

The judge shall fix the days upon which the receiver is to leave and pass his accounts, and also the days upon which such receiver shall pay the balances appearing due on the accounts so left, or such part thereof as the chief clerk shall certify as proper to be paid by them, and in case of neglect the judge before whom the receiver is to account shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries claimed by such receivers, but also charge them with five per cent. per annum upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such receivers (24 Cons. Or. r. 2). Upon the receiver's account being left in the judge's chambers to be passed, a summons to proceed thereon shall be taken out, and the account when passed shall be entered by the solicitor of the receiver in books as under the former practice; when all has been done the books containing the accounts shall be deposited in the office of the clerk of the records and writs (24 Cons. Or. rs. 2, 3, and 4). And by 35 Cons. Or. r. 23, in case of such receiver making default in leaving or passing any account, or in making any payment, or in case any other proceedings pending at a judge's chambers be not prosecuted with due diligence, the parties, or any of them, may be required to attend at chambers at any time to be appointed for that purpose, to show cause why such account has not been left or passed, payment made, or other proceeding prosecuted; and thereupon such directions may be given at chambers or by adjournment in open court as shall be proper to ensure the prosecution thereof by some person interested

CHAP. II.

therein, and for the discharge of such receiver and the appointment of another.

Decision of the court as to a receiver.

The appointment of a receiver is conclusive, unless some substantial objection be shown: and, therefore, although a practising barrister may be appointed as receiver, yet the solicitor in the cause cannot, by reason of the general rule that no person ought to control his own accounts (*k*); and, upon the same principle, the solicitor under a commission of lunacy was not allowed to be appointed receiver of the lunatic's estate, the court being extremely jealous of appointing any person to be receiver whose duty it is to call the receiver to an account (*l*); for it is a rule in equity and common sense, based upon principles of human nature (*m*), that a man shall not place himself in a situation wherein his private interests conflict with his duty: should he, therefore, act in opposition to this provision, whatever personal advantage he thereby acquires it must be rigidly accounted for. The same objection prevails also with respect to a trustee, who, being an accountant party whose duty it is to check the receiver, cannot for that reason be appointed a receiver himself (*n*), unless it be under special circumstances and without emolument; for example, where, taking into consideration his knowledge of the estate, it would be better that the trustee should be permitted to become the receiver, as in the case of a mere trustee for preserving contingent remainders, or a trustee with power of sale and exchange at a future period, and which cannot be exercised during his receivership (*o*). Neither can

Who are disqualified to be receivers.

(*k*) Garland *v.* Garland, 2 Ves. jun. 137.
(*l*) *Ex parte* Pincke, 2 Mer. 452.
(*m*) Broughton *v.* White; Broughton *v.* Broughton, 26 L. T. 54.
(*n*) Anon., 3 Ves. 515; —— *v.* Jolland, 8 Ves. 72.
(*o*) Sykes *v.* Hastings, 11 Ves. 363; Jones *v.* Sutton, 15 Ves. 584.

the *prochein ami* of infant petitioners be allowed to act as receiver; for it is the duty of the next friend to exercise control over the accounts and conduct of the receiver, which would be inconsistent with his appointment to that office (*p*). But in two more recent cases (*q*), it has been determined that an executor and trustee may be appointed consignee as receiver, with the usual profits. A first mortgagee cannot have a receiver, because having the legal estate, he may obtain possession by ejectment (*r*); neither can a master in chancery, nor the receiver-general of a county, be appointed a receiver. And, lastly, as the same remedies cannot be obtained against a peer as may be had against a commoner, in that he cannot be committed for misconduct, the court will object to the appointment of a peer to be a receiver, although he consents to discharge the duties without fees (*s*).

Writ of *ne exeat regno*.

A writ of *ne exeat regno* is a high prerogative writ, originally applied only to purposes of the state, and afterwards extended to private transactions in cases of equitable debt (*t*): as it is a remedy not in itself distinctly referable to private transactions between subject and subject, an application for the writ is to the discretionary power of the Court of Chancery acting beyond the limits of the common law (*u*). This writ issues to restrain a defendant from going out of the kingdom to avoid the process of the court, although it does not seem necessary that the defendant's motive should actually appear, nor

(*p*) Stone *v.* Wishart, 2 Madd. 64.

(*q*) Marshall *v.* Holloway, 2 Swanst. 452; Morison *v.* Morison, 4 My. & Cr. 215.

(*r*) 2 Madd. Ch. Prac.

(*s*) Attorney-General *v.* Gee, 2 Ves. & B. 208.

(*t*) Jackson *v.* Petrie, 10 Ves. 165.

(*u*) De Carrière *v.* De Calonne, 4 Ves. 590.

CHAP. II.

that the affidavit should state that his intention for going abroad is to defeat the jurisdiction, notwithstanding Lord Eldon, in the case of Etches *v.* Lance (*v*), at first held differently; but it is sufficient that the plaintiff's demand is endangered thereby, and for this purpose the Isle of Man (*w*), Ireland, Scotland, and Jersey, are each of them deemed a foreign country (*x*). This process, which is usually prayed for by the bill, although not necessarily so (*y*), can only be obtained by affidavit, swearing positively that the defendant is about quitting the kingdom, or stating some circumstance indicating such intention, whether founded upon his own declaration or the information given by a member of his family (*z*).

To what cases restricted.

The writ of *ne exeat regno*, which enjoins the defendant from the departing the realm without the order of the court, is granted only where the debt amounts to an equitable and not a legal demand; for, in the latter instance, the plaintiff may secure himself by holding the defendant to bail if he is about to quit, unless in those cases wherein equity has a concurrent jurisdiction with a court of law, as where the debt arises from the balance of any account (*a*): moreover the demand must be clear, and a money demand, and actually due (*b*); but, even in this instance, if the plaintiff has had recourse to his remedy at law by means of bail, the court will not allow him a double security by granting this writ in addition

(*v*) 7 Ves. 417.

(*w*) Collinson *v.* ——, 18 Ves. 351.

(*x*) 1 P. W. 262; 2 Dick. 535; 2 Atk. 66.

(*y*) Moore *v.* Hudson, 6 Madd. 218; Barnard *v.* Laing, Vice-Chancellor of England, Dec. 8th, 1842, MS.

(*z*) 18 Ves. 355.

(*a*) Jones *v.* Sampson, 8 Ves. 593.

(*b*) Cook *v.* Ravie, 6 Ves. 283; Blaydes *v.* Calvert, 2 J. & W. 211.

thereto (*c*), neither will a *ne exeat regno* issue in respect of costs taxed in a chancery suit (*d*).

What affidavit necessary.

By analogy to the courts of law, equity will require that the affidavit upon which the writ is granted shall as positively state the fact of the defendant's going abroad, and the exact amount of the equitable demand, as is required by law in the affidavit to hold to bail in respect of a legal debt (*e*), unless the demand be a matter of pure account, as in the case of partners and executors, where information and belief will be sufficient (*f*).

Under what cases the writ is discharged.

The court will, in general, discharge the writ upon the defendant giving sufficient security to abide the event of the suit (*g*), or by stating in his answer or affidavit that he has no intention of quitting the country, or that he is not indebted to the plaintiff (*h*); and for this purpose the answer, which is put in upon oath, may be read in opposition to the affidavit upon which the writ was granted (*i*).

Where the writ is to restrain the party from going to Scotland, and he gives the necessary bond, the condition must be not to go out of the realm, *or to Scotland;* for if it only be not to go out of the realm, the party going to Scotland merely will not forfeit the bond or recognizance (*j*).

The expressions "beyond seas" and "out of the realm"

(*c*) *Ex parte* Branker, 3 P. W. 312—314.

(*d*) Goodman *v.* Sayers, 5 Madd. 471.

(*e*) Rice *v.* Gualtier, 3 Atk. 501; Shearman *v.* Shearman, 3 Bro. C. C. 370, 10 Ves. 164.

(*f*) Jackson *v.* Petrie, 10 Ves. 165.

(*g*) Atkinson *v.* Leonard, 3 Bro. C. C. 218; Roddam *v.* Hetherington, 5 Ves. 91.

(*h*) Harr. Ch. Pr. 536.

(*i*) De Carrière *v.* De Calonne, 4 Ves. 577; Grant *v.* Grant, 3 Russ. 598.

(*j*) Donne's case, 1 P. W. 263.

CHAP. II.

were synonymous. Formerly the term "beyond the realm" or "beyond the seas" embraced Scotland also, as being then out of the realm; but, since the Union, Scotland being part of the realm, it became necessary to make some further provision in respect to the *ne exeat regno*. This writ, if it simply restrained the parties from going out of the *realm*, permitted them to go to Scotland, which was out of the *jurisdiction;* therefore, if it were required to restrain them within the jurisdiction, it was deemed necessary to alter the writ and the recognizance by extending the restraint to Scotland *by name*. The phrase "out of the realm" is not now used, and the legislature, by altering it to "beyond the seas," seems to have pointed to this very case of Scotland (*k*).

Privilege of peerage.

If the defendant claim the privilege of peerage, the plaintiff must pray for a letter missive. If the attorney-general be made a defendant, the prayer must be that he may answer the bill upon being served with an office copy thereof.

Lord Clarendon's order.

It is one of the orders of Lord Clarendon, "That no counsel do put his hand to any bill, answer, or other pleading, unless it be drawn or at least presented by himself in the proper draft before it be engrossed; and counsel are to take care that the same be not stuffed with repetitions of deeds, writings, or records *in hæc verba*, but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief terms, without long and needless traverses," etc.

(*k*) See Ruckmaboye *v.* Mottehund, before the Privy Council, upon appeal from the Supreme Court at Bombay, 22 Law Times, 203; Moore's Cas. Privy Coun. p. 4.

CHAPTER III.

OF THE PARTIES TO A SUIT.

Usual practice respecting parties to a suit.

It has been somewhat quaintly said that "a court of equity delighteth to do complete justice, and not by halves" (*a*); and thus, for the purpose of doing this complete justice between all the parties interested in the suit, and to pronounce such a decree as will prevent future litigation, and protect the interests of those who are called upon to obey its decree, the strict rules of the court demanded that all persons materially interested, however numerous, should be made parties to the suit, unless where it was impracticable to bring them all before the court; as if one or more of the persons who were interested in the subject of the suit happened to be out of the jurisdiction of the court, in which case proceedings might have been had without such persons against all the others. But it was and still is the practice to add the name of a person out of the jurisdiction to the bill, in order that his interests may appear in connection with the other parties on the record; and where it is seen by the bill that the sole plaintiff *resides* abroad, the defendant may, by making immediate application, as soon as he has gained information of the fact, obtain an order for the plaintiff to give security for costs, and that he may not be forced to answer until a certain time has elapsed from the period of giving such security; and if the fact of the

(*a*) Knight *v.* Knight, 3 P. Wms. 333.

CHAP. III.

plaintiff residing abroad come to the defendant's knowledge in the course of the cause, he may apply at any time, provided he has not waived his right by any subsequent proceedings (*b*). But no order will be allowed where there are co-plaintiffs residing in England (*c*).

Exceptions to the general rule.

The court, however, for the purpose of saving expense, delay, and the inconvenience of a multitude of suits by persons claiming similar equities, would sometimes permit a few persons out of a larger number to file a bill on behalf of themselves, and all others in the same interest (*d*). Thus, in the common case, where a few creditors instituted a suit on behalf of themselves and all other the creditors of their debtor deceased, the decree being made for the general benefit of such creditors, all the others who were not made actual parties to the bill might have come in under the decree, and claim satisfaction out of the real and personal estate of the deceased, equally with those creditors in whose name the bill was filed. In the same manner a legatee might substantiate proceedings in equity on behalf of himself and the other legatees. It was also held that one of the shareholders of a canal was at liberty to file a bill on behalf of himself and the rest of the shareholders, for the purpose of setting aside an agreement entered into by the commissioners of the canal, contrary to the provisions of the Act of Parliament under which the canal was made (*e*). Generally speaking, however, where the equity of the bill touches any particular person, so as to establish a right against him, or fasten upon him a duty, he is a necessary party (*f*).

(*b*) Weeks *v.* Cole, 14 Ves. 518.

(*c*) Walker *v.* Easterby, 6 Ves. 612.

(*d*) Cockburn *v.* Thompson, 16 Ves. 321; Evans *v.* Stokes, 1 Keen, 24; Meux *v.* Maltby, 2 Swans. 277.

(*e*) Gray *v.* Chaplin, 2 Sim. & S. 267.

(*f*) Calvert's Par. to a Suit, 16, 2nd ed.

Principles upon which the court decides the question as to parties.

In determining the question as to the proper parties to a suit, the court proceeds upon two leading rules; the one is, that no decree shall be binding upon any one who is not considered by the court either as a party, or as one claiming under a party to the suit (*g*); and it may be laid down, as a general principle, that all persons who have in the object of the suit an interest apparent upon the record are necessary parties (*h*). The other rule is that, when a decree is once made, it shall provide for all the rights of the several parties interested in the subject of the suit. This principle of doing complete justice is peculiar to a court of equity.

In reference to the relaxation of the ancient rules of the court, by allowing a number of persons to be represented by a few having a common interest in the subject of the suit, see *supra*, Lord Cottenham's observation, pp. 2, 3.

Rules relating thereto.

Where, under the circumstances above referred to, some persons are allowed to institute a suit on behalf of themselves and others, the principal objects to which attention must be directed, as it regards the plaintiffs, are the following:—"1. That it must appear upon the record that the persons represented by the plaintiffs are numerous; 2. That the objects of the suit are beneficial both to the persons represented, and also to the plaintiffs on the record; 3. That they all have a community of interest in all the objects of the suit; 4. That all the persons interested are, personally or by representation, before the court (*i*).

Another reason for relaxing the rule.

Another reason for relaxing the general rule is, where suits are allowed to be instituted against certain persons

(*g*) Daniell's Prac. 390; Smith *v.* Effingham, 7 Beav. 371.
(*h*) Calvert's Par. to Suits, 13.
(*i*) Calv. 44.

CHAP. III.

on behalf of others as well as themselves (*k*); and then the general principles to be attended to in this form of suit are the following:—"1. That the persons against whom the proceedings are taken are too numerous to be brought before the court: 2. That there are defendants on the record, who will fairly and honestly try the right, and will respectively maintain all the several interests which are adverse to those of the plaintiffs; 3. That the rights in issue are in the nature of general rights" (*l*).

But a trustee of a numerous company agreeing to take a lease for the use of the company cannot support a bill for specific performance, unless they make some of the members parties to the suit on behalf of themselves and the others (*m*).

Bill against an acting executor's representative and the surviving executors of testator.

Formerly, where there were several executors, and all renounced but one, who alone proved the will and died, the bill must have been filed, not only against his executors, but against the surviving executors of the original testator, who might at any time have come in and proved the will (*n*), notwithstanding they had renounced. Since the passing of the 20 & 21 Vict. c. 77,* however, it would seem that it would not now be proper to file the bill against the surviving executors who had renounced; for it is provided by section 79 of the Act, that where any person renounces probate of the will of which he is appointed executor, or one of the executors, the right of such person in respect of the executorship shall wholly cease, and the administration of the effects of the testator shall without any further renunciation devolve and be

(*k*) Adair *v.* New River Company, 11 Ves. 444.

(*l*) Calv. 53.

(*m*) Douglass *v.* Horsfall, 2 S. & S. 184.

(*n*) 1 Cox, 426.

* An Act to amend the Law relating to Probates and Letters of Administration.

committed in like manner as if such person had not been appointed executor.

Attorney-General party to a charity suit.

In all suits relative to charitable funds, the attorney-general must be made a party; but he is not a necessary party where a private charity is the subject of the suit (*o*), nor in respect of a legacy given to a charity on a bill filed against an executor for an account (*p*).

Welford's Pleadings.

In illustration of the above rules, the student will do well to consult the principles contained in the following cases, for the arrangement of which the writer is indebted mainly to Mr. Welford's Pleadings in Equity. In Manning *v.* Thesiger (*q*), where, under a settlement, a married woman appointed property to parties who were very numerous, certain of them were allowed to file a bill on behalf of themselves and the other appointees, in respect of the property, notwithstanding the general rule of the court, that all appointees, *cestuis que trust*, are necessary parties. In Croker *v.* Perrott, alluded to in the margin of the above-cited case, where a bill had been filed by one of several children, appointees of their mother, to set aside the appointment on the ground of unfairness of distribution, it was held that all the children who were appointees need not be parties, because they might have gone in before the master in respect of their several claims.

Personal representative necessary where suit for general administration.

Where a suit is for the general administration of a testator's estate, and there is no personal representation before the court, though two of the executors, who are out of the jurisdiction, together with the executrix of one of the executors who had not proved, are made parties to the bill, and process is prayed against them in the usual manner, yet the bill will be dismissed with costs,

(*o*) 3 Atk. 277.
(*p*) Chitty *v.* Parker, 4 Bro. C. C. 38.
(*q*) 1 Sim. & Stu. 107.

CHAP. III.

unless, pending the time that the cause stands over, one of the two surviving executors shall come within the jurisdiction or appear (*r*).

Obligee of bond.

It has been held that, where an obligee to a bond, or a judgment creditor, assigned their respective interests, it was necessary to make them parties, because, at law, the right of action remains in them (*s*).

Brace *v.* Harrington.

But in Brace *v.* Harrington (*t*), Lord Hardwicke said that, where the whole equitable interest is assigned over, a person who has a legal interest need not in every case be a party; and, where both assignor and assignee of a debt filed a bill for its recovery, stating the assignment, it was held not to be necessary to prove such assignment, though the defendants stated their ignorance of it, for the assignment was a matter between the two plaintiffs (*u*).

Rights of assignees of copyright must clearly appear.

A demurrer to a bill filed by a publisher, for relief against the infringement of a copyright which he had purchased, was allowed, as it did not appear that the author had assigned the copyright, and who ought therefore to have been made a party to the suit, as being the person who had the legal right in him (*v*).

Privity of interest.

Although a person may be interested in a share of the produce arising from the sale of property made by trustees, yet he will not be allowed to join in a bill for specific performance of a contract for sale, the contracting parties themselves being the only proper persons for that purpose (*w*).

(*r*) Lowry *v.* Fulton, 9 Sim. 104.

(*s*) Mitf.

(*t*) 2 Atk. 235; see also Blake *v.* Jones, 3 Anstr. 651.

(*u*) Ryan *v.* Anderson, 3 Madd. 174; Logan *v.* Fairlie, 2 Sim. & Stu. 284.

(*v*) Colburn *v.* Duncombe, 9 Sim. 151.

(*w*) Wood *v.* White, 4 My. & Cr. 483.

Uncertificated bankrupt

An uncertificated bankrupt, who has a possessory right to a tenement, may maintain a suit to restrain a nuisance, without his assignees being made parties (*x*).

Acceptor of accommodation bill.

The acceptor of an accommodation bill of exchange, instituting a suit against the holder, must make the drawer a party (*y*); but the last indorsee of a lost bill of exchange may file a bill against the acceptor, without making any of the prior indorsees or the drawer parties (*z*).

Agreement for lease on behalf of a numerous company.

Where an agreement for a lease had been entered into by the trustees of a numerous company for the use of the company, a demurrer to a bill filed for a specific performance of the agreement, on the ground that none of the members of the company were parties to the suit, was allowed (*a*); and where a bill was filed for enforcing the execution of a creditor's deed, the scheduled creditors who had executed were held to be necessary parties (*b*).

Personal property held in trust.

Where the trust property is personal and ascertained, a *cestui que trust*, entitled to an aliquot part thereof, may institute a suit against the trustees for the same, without making the other claimants parties to the bill (*c*).

Hutchinson *v.* Townsend.

But in Hutchinson *v.* Townsend (*d*), where parties were entitled to one-fourth of an ascertained fund vested in trustees, although the court, upon the authority of Smith *v.* Snow, allowed some of them to sue for their one-fourth share without making the persons entitled to the other three-fourths parties to the suit, yet the master

(*x*) Semple *v.* The London and Birmingham Railway Company, 9 Sim. 209.

(*y*) Penfold *v.* Nunn, 5 Sim. 405.

(*z*) Macartney *v.* Graham, 2 Sim. 285; Davies *v.* Dodd, 4 Price, 176; Pearce *v.* Creswick, 2 Hare, 286.

(*a*) Douglass *v.* Horsfall, 2 S. & S. 184; *supra*, p. 310.

(*b*) Cocker *v.* Lord Egmont, 6 Sim. 311.

(*c*) Smith *v.* Snow, 3 Madd. 10.

(*d*) 2 K. 675.

CHAP. III.

of the rolls expressed his disapprobation respecting suits so constituted, and said that it would be very inconvenient to encourage suits of the like description. It is presumed, however, that the question is now set at rest by the 15 & 16 Vict. c. 86, s. 42.

Bill for administration of assets.

When there is a bill filed to administer the assets of a person deceased, it is usually necessary to bring before the court the personal representative of a deceased representative as a co-defendant with a continuing or present representative (*e*), although a different doctrine once prevailed (*f*). But it seems that it is not *necessary* to make an executor who has not proved a party to the suit, although he may not have renounced (*g*); nor the representative of an executor or trustee who has never acted nor received assets or died insolvent (*h*).

In a bill for account, personal representative a necessary party.

The court cannot deal with the property of a deceased debtor where the bill is filed for an account, unless his personal representative be before the court and made a party to the record: thus, where the debtor died in India, and his money was bequeathed to the English agent of his executor, who resided in India, and who proved the will there, it was held, on a bill being filed by a creditor of the testator against such agent, praying an account and payment of the money to the accountant-general for security, to be necessary to take out administration in

(*e*) Holland *v.* Prior, 1 M. & K. 237, overruling Phelps *v.* Sproule, 4 Sim. 321.

(*f*) See Ryan *v.* Roche, 2 Molloy, 437, *n.*

(*g*) Cranmer *v.* Morton, 2 Molloy, 108; Davies *v.* Williams, 1 Sim. 5; Strickland *v.* Willaims, 12 Sim. 463.

(*h*) Williams, Ex. 1860; Set. 115; Ling *v.* Colman, 10 Beav. 370; Hall *v.* Austin, 2 Coll. 570; Clark *v.* Webb, 16 Sim. 161; and see Masters *v.* Barnes, 2 Y. & C. 618, as to the distinction between *may* and *must* be parties. And see Whittington *v.* Gooding, 10 Ha. App. 29; Pease *v.* Cheesbrough, Set. 115, as to way to frame bill in such cases.

this country, and to bring the executor before the court (*i*).

A suit was instituted for seeking an account of the assets of a person who died intestate in India, possessed by his personal representative there. A personal representative of the intestate, constituted in England, was adjudged to be a necessary party, although the deceased did not appear to have any assets here at the time of her decease (*k*).

Insolvent personal representative party for discovery.

Where a suit is instituted to carry out the trusts of a will, in which a discovery is sought, the insolvency of the executor or administrator is no reason for his not being made a party; for a discovery of the assets may not be made without him (*l*).

Bankrupt.

A bankrupt also may, for the same reason, *i. e.* discovery, be made a party to a suit against the assignees (*m*); or where he has colluded with his assignee (*n*), but not otherwise.

Heir-at-law and devisee of obligor necessary to a suit for satisfying the bond.

Where a party, obligor to a bond, binding upon his heirs, dies, and a bill is filed for satisfaction out of the real estate devised, the devisee and heir-at-law of the debtor jointly, as well as his personal representative, are necessary parties, by virtue of the 3 & 4 Will. & Mary, c. 14, to prevent fraudulent devises (*o*). The reason laid down by Lord Hardwicke, in Galton *v.* Hancock (*p*), is that the provision of the Act was introduced for the benefit of the creditors merely, without any regard either

(*i*) Logan *v.* Fairlie, 2 S. & S. 284; Lowe *v.* Fairlie, 2 Madd. 101.

(*k*) Tyler *v.* Bell, 2 My. & Cr. 89.

(*l*) Ashurst *v.* Eyre, 2 Atk. 51; S. C., 3 Atk. 341.

(*m*) Red. 161; Dan. 155.

(*n*) Red. 162; but see Dan. 156, citing Gilbert *v.* Lewis, 1 De G., J. & S. 38; 2 J. & H. 452; 9 Jur., N. S. 187.

(*o*) Gawler *v.* Wade, 1 P. Wms. 99; Warren *v.* Stawell, 2 Atk. 125; and see Dan. 225.

(*p*) 2 Atk. 432.

CHAP. III.

to the *heir* or *devisee*, so as to entitle the creditor to a new-formed writ and to bring a new action (*i. e.* an action of debt upon his bond and specialties, against the heir-at-law of the obligor and devisee jointly); for otherwise the devisee and heir-at-law might collude to play off the will or not, just as it should suit them best; therefore it was a necessary and wise provision of the Act to join the heir and devisee in the action, to secure the creditor at all events.

Obligee of bond. 7th Cons. Ord., r. 2.

It was held by Lord Hardwicke (*q*), that an obligee of a joint and several bond must bring all the co-obligors before the court; but the 7th Cons. Ord., r. 2, has produced a material alteration in cases where different parties are liable to the same account. Before this order, where a bill had been filed by an obligee to a joint and several bond, all the obligors, whether principals or sureties (unless when one of such sureties happened to be insolvent), must have been made parties. But under this order, a plaintiff who has a joint and several demand against several persons may now proceed against one or more of the several persons liable, without joining the others as parties in the suit (*r*).

Real and personal representatives of purchaser necessary parties to a bill for specific performance.

To a bill filed by a vendor for specific performance, not only must the heir or devisee, the real representative of the deceased purchaser, be brought before the court, but also his personal representative; for, as the contract cannot be deemed complete (although possession be delivered) until the money be paid, it remains during that interval a specific lien upon the premises (*s*).

Bill for carrying out the trusts of a will.

Formerly when a bill was filed to carry into execution the trusts of a will devising real estates, the heir-at-law

(*q*) Madox *v.* Jackson, 3 Atk. 406.

(*r*) Strong *v.* Strong, 18 Beav. 408.

(*s*) Townsend *v.* Champerdowne, 9 Price, 136; Smith *v.* Hebbert, 2 Dick. 730; Harrison *v.* Harrison, 1 R. & My. 71.

was an essential party, in order that the validity of the will might be admitted or tested; although otherwise, had it been a trust created by deed to pay debts (*t*), unless it was charged and proved that the heir was out of the jurisdiction. In such a case the court, upon full evidence of the due execution of the will and the sanity of the testator, would decree the execution of the trust, which evidence however could not have been read against the heir-at-law, should he afterwards have disputed the will; in the latter event the title still remained uncertain (*u*).

By the 7th Cons. Ord., r. 1, in suits to execute the trust of a will, the heir-at-law, as before observed, need not be a party (*v*), but still the will cannot be established in his absence.

Lord of a manor.

There is a distinction in the case where the lord of a manor ought to be made a party to a suit relating to copyholds and where not. Thus, in an anonymous case, in 6 Vin. Abr. 239, Mich. Vac. 1720, it was held that to a bill filed for the surrender of a copyhold estate for lives, the lord is a necessary party; because, when once the surrender is made, the estate is in the lord, and he is not bound to re-grant it: but in case of copyholds of inheritance it is otherwise, for there he need not be a party.

Bill of foreclosure.

In a bill by a mortgagee to foreclose, it is a general rule that all persons whose interests are to be affected by the decree ought to be made parties to the suit (*x*),

(*t*) Harris *v.* Ingledew, 3 P. Wms. 92.

(*u*) Williams *v.* Whuyates, 1 Bro. C. C. 399; French *v.* Baron, 2 Atk. 120; S. C., Dick. 138.

(*v*) See Weeks *v.* Evans, 7 Sim. 546; Perry *v.* Knott, 5 Beav. 293; Norris *v.* Wright, 14 Beav. 291; Attorney-General *v.* Pearson, 2 Coll. 581; Attorney-General *v.* Corporation of Leicester, 7 Beav. 176; Bateman *v.* Margerison, 6 Hare, 496.

(*x*) Bishop of Winchester *v.* Beavor, 3 Ves. 314; Adams *v.* St. Leger, 1 Ball & Bea. 182; Tuite *v.* Pallas, 1 Hogan, 261; Whistler

CHAP. III.

unless they became incumbrancers *pendente lite*, in which latter case their interests would be equally bound by the decree, as they are deemed to have purchased with constructive notice * (*y*). The principle of making incumbrancers parties is that, with regard to prior mortgagees, their rights are paramount to those of the party foreclosing, and cannot be affected by the contention between the mortgagor and second mortgagee, and so need not (though they may) be made parties to the suit. But those who are subsequent must be made parties, because their interests would otherwise be affected without an opportunity of protecting them (*z*). A mesne incumbrancer, however, or the mortgagor, may bring all the incumbrancers before the court, but in such case he must offer to redeem prior incumbrancers (*a*).

Judgment creditors.

It has been held that judgment creditors whose judgments have been entered up subsequently to the plaintiff's security, must be made parties to a bill of foreclosure; but it is presumed that under the 27 & 28 Vict. c. 112, the merely entering up the judgment will not be sufficient for that purpose, unless by a writ of elegit or other lawful authority in pursuance of such judgment the land

v. Webb, Bunb. 53; Calverley *v.* Phelps, 6 Madd. & Gel. 231; Palk *v.* Clinton, 12 Ves. 58.

* But no *lis pendens* is now constructive notice, unless registered in the Common Pleas, in pursuance of 2 & 3 Vict. c. 11, s. 7.

(*y*) Garth *v.* Ward, 2 Atk. 174; Yates *v.* Hambly, ibid. 237; Dan. 270, *et seq.*; Powell *v.* Wright, 7 Beav. 444; Humble *v.* Shore, 3 Ha. 119.

(*z*) Draper *v.* Earl of Clarendon, 2 Vern. 518; Godfrey *v.* Chadwell, ibid. 601; Morret *v.* Western, ibid. 663; Hobart *v.* Abbott, 2 P. Wms. 643; Delabere *v.* Norwood, 3 Swan. 144; Sheppard *v.* Grunnell, ibid. 151; Rose *v.* Page, 2 Sim. 471; Richards *v.* Cooper, 5 Beav. 304; Arnold *v.* Bainbridge, 2 De G., F. & J. 92; Audsley *v.* Horn, 26 Beav. 195; 6 Jur., N. S. 205.

(*a*) Gordon *v.* Horsfall, 5 Moore, 393; 11 Jur. 569.

shall have been actually delivered in execution. It is not sufficient that these creditors should be served with copies of the bill under 10th Cons. Ord., r. 1 (*b*).

Distinction between those who must and those who may be parties.

There is a distinction observed between persons who are indispensable parties to the record, and those who may with propriety be made so (*c*). Thus, to a bill of foreclosure, if the personal representative of the mortgagor be interested in the equity of redemption, as where the mortgage was for a term of years, he must be made a party (*d*). But, ordinarily, in a bill to *foreclose* a mortgage of realty, it is not necessary that the personal representative of the mortgagor should be made a party to the suit; for, as the heir of the mortgagor alone has the right to the equity of redemption which it is sought to foreclose, he has no right to demand that the personal representative should be joined to relieve him out of the personal estate, since he has his own remedy in equity against him, for compelling payment out of the personal assets of the deceased mortgagor (*e*). But it is necessary to bring him before the court for the sale of the mortgaged property, as no account can be taken in his absence, because the personal estate must be first exhausted, before the court will direct the real estate to be sold (*f*). Where, also, the devisee or heir of the mortgagor files his bill to *redeem*, he *may* properly make the personal representative of the mortgagor a party defendant, because either may require the personal assets to be applied

(*b*) Adams *v.* Paynter, 1 Coll. N. C.

(*c*) Story's Eq. Pl. 182, *n.* 2, and Masters *v.* Barnes, 2 Y. & C. 618.

(*d*) Bradshaw *v.* Outram, 13 Ves. 235; Cholmondeley *v.* Clinton, 2 Jac. & W. 135.

(*e*) Duncombe *v.* Hansley, 3 P. Wms. 333, *n.* (A); Coop. Eq. Pl. 38.

(*f*) Christopher *v.* Sparke, 2 Jac. & W. 229.

CHAP. III.

in exoneration of the mortgaged estate (*g*). In the case of the mortgagee, however, it is different; for he may elect to make the personal representative a party to obtain payment of the mortgage out of the personal estate (*h*).

Heir of mortgagee trustee for executor.

Where a mortgagee dies without devising the mortgaged estate, it descends to his heir, who is a trustee thereof for the executors, who are the proper parties to receive the mortgaged money (*i*).

And in a suit by a specialty creditor for satisfaction out of the realty the personal representative as well as the heir must be a party, because the personalty is primarily liable (*k*).

Large bodies in the nature of partnerships.

When parties are too numerous to be brought before the court, and, in such cases, a few are allowed to file a bill on behalf of themselves and the rest of the persons interested, they must not assume to themselves a corporate character (*l*); and the bill must distinctly state that it is on behalf of the plaintiffs and of all persons interested in the subject-matter of the suit, in order that they may participate in the benefit of the decree, or show error upon the decree to entitle themselves to a re-hearing. And the court will entertain a petition or a bill, to bring more distinctly before the court the rights of the absent

(*g*) Howell *v.* Price, 1 P. Wms. 701; Waring *v.* Ward, 7 Ves. 376; Bradshaw *v.* Outram, 13 Ves. 234; Robinson *v.* Gee, 1 Ves. 352; Knight *v.* Knight, 3 P. Wms. 333—358; Rylands *v.* Latouche, 2 Bligh, 566—584. But see Locke King's Act, 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, as to devisees and heirs taking the land *cum onere*, unless a contrary intention is expressed by a will.

(*h*) Bradshaw *v.* Outram, 13 Ves. 235.

(*i*) Co. Litt. 288, b. *n.* (1); 2 Vent. 348, 351; 3 Bart. Elem. Convey. c. 6, s. 5, p. 349.

(*k*) Madox *v.* Jackson, 3 Atk. 406; Knight *v.* Jackson, 3 P. Wms. 333.

(*l*) Lloyd *v.* Loaring, 6 Ves. 773.

parties (*m*). And where a bill is filed against a few persons, as representing a numerous class, it must allege that the suit is brought against them in the representative character (*n*). So, if they do not sue in a corporate capacity, a few of the members of a lodge of freemasons may institute a suit on behalf of themselves and others, provided the object of justice would be otherwise frustrated (*o*); and, in many other instances, where the number of proprietors was very numerous, it was held to be sufficient, there being a privity of interest, and one common responsibility, to make some of them defendants on behalf of themselves and the whole company, as in the case of the inhabitants of a parish claiming rights of common under a trust (*p*). The court will, however, in these cases, see that there shall be a proper representation of all substantial interests before the court (*q*). Several of a numerous class may represent the class both as plaintiffs and defendants (*r*).

But, where a suit was instituted on behalf of a friendly society against the trustees, all the members were required to be parties (*s*).

Officer of a public company.

In most public companies they have their recognized officers, representing the company itself: these func-

(*m*) Adair *v.* The New River Company, 11 Ves. 444; Cockburn *v.* Thompson, 16 Ves. 326; Good *v.* Blewitt, 13 Ves. 397; S. C., 19 Ves. 336; Angel *v.* Hadden, 1 Madd. 529; Weak *v.* West Middlesex Water Company, 1 J. & W. 369; Weld *v.* Bonham, 2 S. & S. 91.

(*n*) Lanchester *v.* Thompson, 5 Madd. 13.

(*o*) Lloyd *v.* Loaring, 6 Ves. 773.

(*p*) Mitf. by Jer. 169.

(*q*) 11 Ves. 429; Small *v.* Attwood, 1 Younge, 407—458; Walburn *v.* Ingleby, 1 M. & K. 76. See 2 S. & S. 18; 4 Russ. 562—576.

(*r*) Bromley *v.* Williams, 32 Beav. 177.

(*s*) Beaumont *v.* Meredith, 3 Ves. & B. 180.

tionaries, therefore, may be sued without making all the directors and shareholders parties to the suit (*t*). And where a committee has been appointed to act on behalf of a large body, who had formed themselves into a society, and who had, as such committee, contracted debts with several tradesmen, a suit was held to be maintainable against the committee alone, without making the rest of the members parties (*u*).

One creditor on behalf of himself and all others.

Where a bill is filed by one creditor on behalf of himself and all other creditors of the deceased debtor, for a general account of his property, those who are absent, provided they have not been guilty of any wilful default, are entitled to share in the assets which those before the court may have received (*x*). This is done by coming in under the decree for proving their debts before the chief clerk, or they will be excluded from all benefit under the decree (*y*). The court, in such a case, takes upon itself the whole administration of the assets, both real and personal; and thus assuming a paramount authority over the executors or trustees, will, by the decree, exonerate them from all further liability in the discharge of their duties.

Necessary that they should have one common interest.

But, in case one creditor sues on behalf of himself and all other creditors, it is necessary that he should have one common interest with the creditors generally. Thus, it has been held that a mortgagee cannot sue on behalf of himself and all the creditors, in respect to the mortgage debt; for his interest is peculiar to himself: nor where a

(*t*) Attwood *v.* Small, per Lord Cottenham, Feb. 3, 1841; 2 Beav. 539, *n.*; ibid. 538.

(*u*) 1 Bro. C. C. 101.

(*x*) David *v.* Frowd, 1 M. & K. 200; Gillispie *v.* Alexander, 3 Russ. 130.

(*y*) Mitf. by Jeremy, 166; Story's Eq. Pl. 82, *n.* (r); Law *v.* Rigby, 4 Bro. C. C. 66; Anon., 9 Price, 210; Good *v.* Blewitt, 19 Ves. 336; Gifford *v.* Hort, 1 Sch. & Lef. 419.

creditor seeks to establish a priority of right can he sue in this manner; for, as he has no common interest with the creditors at large, each one of them is interested in contesting his claim, and must, therefore, all be made actual parties to the suit (*z*).

One creditor may file a bill for himself individually; and, so far as other creditors of the same degree, he may obtain priority, by means of the decree in his favour, over those who have not used the same diligence (*a*): but he is not allowed, by these means, to acquire a priority over creditors of a superior degree, and, in some cases, he will not be permitted to acquire a preference to those of an equal degree (*b*).

One creditor may file a bill for himself only.

Where there are persons who claim the personal estate under a general description, as the relatives or next of kin to a party who died intestate, a suit may be maintained by one claimant on behalf of himself and the other claimants (*c*).

In the case of partners it is usual, where a bill is filed by or against them, to bring all the partners before the court (*d*). If one of the partners be out of the jurisdiction a decree for a debt in which all the partners are liable may be had against those who are within the jurisdiction, without making the absent partner a party to the suit (*e*). It is different, however, where a bill is filed

Partners.

(*z*) Burney *v.* Morgan, 1 S. & S. 358—362; Newton *v.* Earl of Egmont, 5 Sim. 137; S. C., 4 Sim. 574—585; Jones *v.* Garcia del Rio, 1 Tur. & R. 297.

(*a*) Hall *v.* Benney, 6 Ves. 738; Mitf. by Jeremy, 166—7; Set. 117.

(*b*) Newland *v.* Champion, 1 Ves. 104; Peacock *v.* Monk, ibid. 131.

(*c*) Mitf. by Jer. 169; Montagu *v.* Nucella, 1 Russ. 166.

(*d*) Moffatt *v.* Farquharson, 2 Bro. C. C. 338; East India Company *v.* Neave, 5 Ves. 172; Weymouth *v.* Boyer, 1 Ves. jun. 417; Fallowes *v.* Williamson, 11 Ves. 313; 3 Swan. 139.

(*e*) 2 Atk. 510; Cowslad *v.* Cely, Pre. in Chan. 83.

CHAP. III.

among themselves for an account and dissolution ; for, in that case, if one of the partners be out of the jurisdiction, the suit cannot proceed (*f*). But where the partners are very numerous, the court will, it seems, except in suits for a dissolution, allow the partners in the same interest to be represented by some only suing or defending on behalf of the others (*g*).

All adventurers necessary parties, where profits and losses are shared.

Where all the profits and losses are to be shared in certain stipulated proportions, all the adventurers in the undertaking must be made parties to the suit (*h*). When one of several partners dies, the surviving partners are necessary to be joined in a suit against the personal representative of such deceased partner for a joint debt, as they have an interest in disputing the debt, and have a right to be heard in the office of the chief clerk in taking the account (*i*).

But whether the surviving partners, suing for a partnership debt, are bound to join the personal representative of the deceased partner may be subject to doubt (*j*).

Where the bill alleges that a person who would have been a necessary party died insolvent, without leaving assets to pay his debts, it is not necessary to make his personal representatives parties to the suit (*k*).

Most of the cases having relation to the administration

(*f*) Beaumont *v.* Meredith, 3 Ves. & B. 180; Evans *v.* Stokes, 1 K. 24; Van Sandau *v.* Moore, 1 Russ. 441.

(*g*) Dan. 225; Richardson *v.* Larpent, 2 Y. & C. C. 507, 514; Jur. 691; Pare *v.* Clegg, 29 Beav. 589; 7 Jur., N. S. 1136.

(*h*) 2 You. & Coll. Eq. Ex. R. 61.

(*i*) Wilkinson *v.* Henderson, 1 M. & K. 582—588; Holland *v.* Prior, 1 M. & K. 237; Blackburn *v.* Jephson, 3 Swan. 139; Cox *v.* Stephens, 9 Jur., N. S. 1144; 11 W. R. 929; Hills *v.* MacRae, 9 Ha. 927, notwithstanding Cons. Ord. 7.

(*j*) Cockburn *v.* Thompson, 16 Ves. 326; Madox *v.* Jackson, 3 Atk. 406; Story's Eq. Pl. 130 *n.* (r); Anon., 2 Freem. 127.

(*k*) Seddon *v.* Connell, 10 Sim. 79; Pease *v.* Cheesbrough, Set. 115.

of the assets of companies have, by reason of the greater facility afforded by the Acts relating to public companies, become of very little importance ; especially since the passing of the 25 & 26 Vict. c. 89, "The Companies Act, 1862."

Rule as to restraining parties beyond tenant in tail in settled estates.

As a general rule, when settled estates are subject to dispute, it is usual not to bring before the court any parties representing that estate beyond the tenant in tail, and not those in remainder or reversion, after such vested estate of inheritance (*l*) (except where an infant or lunatic has the first estate of inheritance as tenant in tail (*m*)), and a decree against a person having that vested estate of inheritance is binding on those in remainder or reversion. But it seems that all persons having interests prior to the first estate of inheritance, together with the owner of that estate of inheritance, must be brought before the court, so that if he who has the first estate of inheritance should happen to die pending the suit, the person who has the next estate of inheritance must be made a party to the record. Also, if after the suit is instituted, and pending the same, one happen to be born claiming an interest prior to any estate of inheritance, he must be made a party ; and if, by the determination of a contingency, a new interest arise not subject to be defeated or destroyed by a previous estate of inheritance, the person entitled to that interest must be brought before the court (*n*).

Persons claiming paramount to a will.

But devisees filing a bill to establish a will and carry the trust into execution have no right to call upon persons who claim paramount the will to litigate such claims with them (*o*).

(*l*) 2 Madd. 183. See the cases cited there.

(*m*) Lord Dursley *v.* Fitzhardinge, 6 Ves. 251.

(*n*) Mitf. by Jerem. 174; Sherrit *v.* Birch, 3 Bro. C. C. 229; Dan. 220, *et seq.*

(*o*) Devonsher *v.* Newenham, 2 Sch. & Lef. 210.

CHAP. III.

Where proper persons cannot be brought before the court the reason of such inability must be stated in the pleadings, as where a representative is a necessary party and the representation is in litigation (*p*), or the persons who are proper parties are not known to the plaintiff, in which cases the court will excuse their absence.

Parties out of the jurisdiction.

When parties are out of the jurisdiction of the court, and they are mere passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, a complete determination may be obtained against them (*q*). But if the person out of the jurisdiction be an active party in the execution of the decree, or if his rights be wholly distinct from those of the other parties or principally affected by the bill, the court cannot proceed to a determination in his absence (*r*). And when the party is so absent, that fact must be positively stated in the bill and proved at the hearing (*s*).

The court will sometimes make a decree without prejudice to the rights (if any) of absent parties, or reserving all questions concerning their interests (*t*), if this can be done without affecting such interests.

Under 15 & 16 Vict. c. 86, s. 57, the court is empowered to make a decree in the absence of parties, provided their interests are sufficiently represented by

(*p*) Plunket *v.* Penson, 2 Atk. 51; Jones *v.* Frost, 3 Madd. 1; Mitf. by Jer. 180.

(*q*) Mitf. by Jerem. 164; Meux *v.* Maltby, 2 Sw. 278; Stor. Eq. Pl. 67.

(*r*) Mitf. by Jerem. 165; Fell *v.* Brown, 2 Bro. C. C. 277; Brown *v.* Blount, 2 K. & M. 83; Roveroy *v.* Grayson, 3 Swan. 145, *n.*

(*s*) Moodie *v.* Bannister, 1 Drew. 574; Jackson *v.* Norton, 4 Jur., N. S. 1067; 7 W. R. 4.

(*t*) Willats *v.* Busby, 5 Beav. 193; Powell *v.* Wright, 7 Beav. 444; Morley *v.* Rennoldson, 2 Ha. 570; 7 Jur. 938; Mores *v.* Mores, 6 Ha. 125; 12 Jur. 620.

persons before the court (*u*); but such decree is not binding on the absent parties (*x*) like a decree served on them under sect. 42 (see post). And by Cons. Ord. 10, r. 7, the bill, &c. may, by special leave, be served upon a party out of the jurisdiction in any suit.

Where *cestuis que trust* not necessary.

If the absolute disposition of the property be vested in trustees, the persons interested under the trust need not be made parties in a suit instituted against the trustees by persons having a prior demand to the creation of the trust (*y*). Where there are trustees appointed of a real estate for the payment of debts or legacies, they may maintain or defend a suit without bringing before the court the creditors or legatees for whom they were appointed, and whose rights will be bound by the decision against the trustees (*z*).

For when the interest of those who are beneficially entitled is completely represented by the trustees, and the trust is of such a nature as to produce a great inconvenience amounting to a denial of justice, if all the *cestuis que trust* were required to be brought before the court the trustees may alone sustain a suit, either as plaintiffs or defendants (*a*).

Bill by *cestui que trust* against trustees.

Where a suit is instituted by a *cestui que trust* against trustees who are implicated in one common breach of trust, and seeking relief in respect of that particular breach of trust only, he may either bring his suit against all or one of them only (*b*), although it has been held, that

(*u*) Swallow *v.* Binns, 9 Ha. App. 47.

(*x*) Doody *v.* Higgins, 9 Ha. App. 32.

(*y*) Mitf. by Jerem. 175.

(*z*) Ibid. 174; 3 Ves. 75; Curteis *v.* Candler, 6 Madd. 123; Douglass *v.* Horsfall, 2 S. & S. 184; Pr. in Ch. 275.

(*a*) Mitf. by Jerem. 176—179; 2 Bro. C. C. 225; see Osbourne *v.* Fellows, 1 R. & My. 743; and the case of Yates *v.* Hambly, 2 Atk. 237, there cited.

(*b*) Walker *v.* Symonds, 3 Swan. 75; Seddon *v.* Connell, 10 Sim. 79.

CHAP. III.

where several trustees are implicated in a breach of trust the *cestui que trust*, in order to recover the trust fund or to obtain any relief to which a general account or general administration is or may be necessary in order to ascertain the amount for which the breach renders the trustees or executors liable, must file his bill against all the trustees who are living and the representatives of such of them as are dead (at least if the dead ones have acted and received assets (*c*)), and is not at liberty to proceed against some of them only (*d*).

Where a bill for discovery is filed in aid of a defence to an action at law, a person who is not a party to the action cannot be joined as a co-plaintiff (*e*).

Contingent limitations in trust.

If there be a number of contingent limitations of a trust, the trustees, together with the party who has in himself the first estate of inheritance, are all that are necessary, among those interested in the estate, to be brought before the court (*f*) ; and a decree against the person having such first estate of inheritance will generally be binding upon those in remainder or reversion, although, by a failure of the preceding estate, those in remainder or reversion may afterwards vest in possession (*g*). And such remainderman, subsequently becoming entitled in possession, may appeal from a decree made against a person having a prior

Decree against the first person taking the inheritance binding on those in remainder.

(*c*) Williams, Ex. 1860; Set. 115; Ling *v.* Colman, 10 Beav. 370; Hall *v.* Austen, 2 Coll. 570; Clerk *v.* Webb, 16 Sim. 161.

(*d*) Coppard *v.* Allen, 2 De G., J. & Sm. 173; Chancellor *v.* Morecraft, 11 Beav. 262; Biggs *v.* Penn, 4 Ha. 469; Hall *v.* Austen, 2 Coll. 570; Penny *v.* Penny, 9 Ha. 39, notwithstanding Cons. Ord. 7, r. 2.

(*e*) Irving *v.* Thompson, 9 Sim. 17; Bromley *v.* Holland, 7 Ves. 3.

(*f*) Hopkins *v.* Holland, 1 Atk. 591; Cholmondeley *v.* Clinton, 2 Jac. & W. 133, *ante*, p. 319.

(*g*) Mitf. 173; Lloyd *v.* Johnes, 9 Ves. 57; Gifford *v.* Hort, 1 Sch. & Lef. 384—408.

estate of inheritance, but cannot avoid the effect of the decree by a new bill (*h*) : for the owner of the first estate of inheritance virtually represents all subsequent estates (*i*), and if he be tenant in tail, with remainder over, it is competent for him to bar all these remainders over from having any interest whatever in the estate. There is, however, an exception where the owner of the first estate of inheritance happens to be an infant or a lunatic, for in such a case the next remainderman may properly be joined in the suit (*k*).

The General Orders of 26th August, 1841, were intended to simplify the proceedings in Chancery and made considerable alterations as regarded the necessary parties to a suit.

The Act of the 15 & 16 Vict. c. 86, which succeeded the General Orders of 26th August, 1841, has now brought about further improvements in the practice of pleading as to the necessary parties to a suit.

Principles which govern these Orders.

The principles upon which these Orders were framed, are thus stated in Faulkner *v.* Daniel (*l*) :—"A party may stand in one of three different positions. He may be a necessary party to a suit, because other parties to the record cannot have justice done them in his absence ; or he may be a necessary party, as having an interest of his own, which interest the court may be able to protect by saving his rights in the decree ; or he may have an interest of his own, which the court may not be able to protect if a decree be made in his absence."

But it will easily be seen that notwithstanding the

(*h*) Ibid.; Osbourne *v.* Usher, 2 Bro. P. C. 314.

(*i*) Story's Eq. Pl. 118.

(*k*) Lord Dursley *v.* Fitzhardinge, 6 Ves. 251.

(*l*) Per V.-C. Wigram, 3 Hare, 212; Morley *v.* Rennoldson,—— Linkson, 2 Hare, 586; May *v.* Selby, 6 Jur. 52; Hill *v.* Ledbrooke, ibid. 1078.

beneficial tendency of these few Orders of 1841, which were designed to bear upon the inconvenience and heavy expense arising out of the general necessity for making all persons claiming an interest under a suit parties thereto, much remained still to be accomplished in the task of facilitating and simplifying the progress of a chancery suit in respect to interested parties. Thus, by the 15 & 16 Vict. c. 86, s. 42, which made further and more important alterations in the practice of pleading as to parties, it is enacted,—That it shall not be competent to any defendant in any suit in the said court to take any objection for want of parties to such suit, in any case to which the rules next hereinafter set forth extend; and such rules shall be deemed and taken as part of the law and practice of the said court, and any law or practice of the said court inconsistent therewith shall be and is hereby abrogated and annulled.

Defendant not to take objection for want of parties in any case to which rules herein set forth shall extend.

Although these rules hereafter mentioned are intended to save expense in chancery proceedings by considerably limiting the actual number of parties to a suit, yet they by no means abolish the ancient principles of the court, which require that all persons materially interested in a suit shall be made parties to the record; for, according to Rule 8, such persons must be served with notice of the decree, so that it will still be necessary to ascertain who those persons are who would, under the old practice, have been made parties to the suit. By referring to Orders 26th of August, 1841, which are now abolished, it will be seen that the notion of these present rules was shadowed forth by those Orders, but the rules themselves are more ample.

Rule 1. Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.

Rule 2. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.

Rule 3. Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.

Rule 4. Any one of several *cestuis que trust* under any deed or instrument may, without serving any other of such *cestuis que trust*, have a decree for the execution of the trusts of the deed or instrument.

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

Rule 6. Any executor, administrator, or trustee, may obtain a decree against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate, or the execution of the trusts.

Rule 7. In all the above cases the court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Rule 8. In all the above cases the persons who, according to the present practice of the court, would be necessary parties to the suit, shall be served with

notice of the decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may by an order of course have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the general order of the lord chancellor, apply to the court to add to the decree.

The time referred to is limited to one month after service (*m*) by (23rd Cons. Ord. r. 18).

Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit: but the court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties.

This rule is applicable not only to administration suits but to all other suits, when the interest of the *cestui que trust* is represented by, and his powers vested in, the trustee (*n*). And the court has held that the representation of the *cestuis que trust* of real estate, under the same rule, in suits against them for foreclosure or sale, extended to the case of infant *cestuis que trust*, they not having the means of redeeming the mortgage, and to the trustees of subordinate interests under settlements of shares

(*m*) Clarke *v.* Clarke, 20 Law Times, 81.

(*n*) Fowler *v.* Bayldon, 9 Hare, Append. 78.

of children in remainder; but not otherwise to adult *cestuis que trust* (*o*).

The rule does not extend to cases where in a suit for foreclosure against an infant heir-at-law of the mortgagor the devisees in trust under the will of the mortgagor had disclaimed, and in the absence of any adult parties before the court who could redeem the estate (*p*). Nor does it apply to where the surviving trustees or representatives of trustees alone are parties; for in such a case the court will require the *cestui que trust* to be also represented in order to secure the due application of the trust fund (*q*). Nor in a suit to set aside a settlement on the ground that it had been obtained by the trustees (who were themselves interested under it) by fraud (*r*).

Practice of setting down a cause on objection for want of parties abolished.

The practice of the court of setting down a cause, merely on an objection for want of parties to the suit, shall be abolished (15 & 16 Vict. c. 86, s. 43).

Court may proceed in any suit, etc. without representative of deceased person, or may appoint one.

If in any suit or other proceeding before the court it shall appear to the court that any deceased person who was interested in the matters in question has no legal personal representative, the court may either proceed in the absence of any person representing the estate of such deceased person, or appoint some person to represent such estate for all the purposes of the suit or other proceeding, and the order of the court shall bind the estate of such deceased person as if there had been a duly constituted legal personal representative of such deceased person who had been made a party to the suit (15 & 16 Vict. c. 86, s. 44).

This provision will save the necessity of compelling a

(*o*) Goldsmith *v.* Stonehewer, ibid. 38; S. C., 22 Law Jour. 109; 17 Jur. 199.

(*p*) Young *v.* Ward, 10 Hare, Append. 58.

(*q*) Stansfield *v.* Hobson, 16 Beav. 189.

(*r*) Read *v.* Prest, 3 Week. Rep. 30.

plaintiff to take proceedings in the ecclesiastical court, when there has been neither probate nor letters of administration taken out to a party deceased, who was interested in the suit, for the sake of compelling some person, either to prove the will or administer, who might afterwards be made a party to the suit, to represent the deceased (*s*).

Where a number of creditors were interested in property comprised in a trust deed, made for their benefit, they may proceed in a suit against the trustees without a personal representative of the deceased debtor, the author of the trust, where no such representative existed, and the estate was insolvent, and, also, where an executor has died intestate and insolvent, and attempts to obtain representation to him has proved abortive (*t*).

This does not apply to the case in which it is desired to appoint a representative, and the estate is being administered by the court (*u*); nor where in a creditor's suit an administrator *ad litem* has only been appointed, as such a person does not sufficiently represent the deceased for the purpose of administering his estate (*x*); neither where the application is for paying money out of court (*y*); nor where a decree is sought to be obtained against parties personally (*z*). This was in a foreclosure suit in which the plaintiff was sub-mortgagee; for it was there stated that it was not the intention of the legislature that the suit should proceed without the representative

(*s*) 2 Kennedy's Code, 162, *n.* (c); *vide Ex parte* Cramer *re* Stewart's Trusts, 20 Law Times, 87.

(*t*) Band *v.* Randle, 2 Week. Rep. 331; Chaffers *v.* Headlam, 9 Hare, Append. 46.

(*u*) Silver *v.* Stein, 1 Drew. 295.

(*x*) Groves *v.* Levi, 9 Hare, Append. 47; 16 Jur. 1061.

(*y*) Rawlins *v.* M'Mahon, 1 Drew. 225.

(*z*) Bruiton *v.* Hughes, 21 Law Times, 123.

of a deceased party against whom a decree is sought; but in whatever case it can be properly applied, that it should be in the discretion of the court when it sees that it can be done without danger to anybody. Under this section, the executors of a father who survived, and became sole next of kin of his deceased children, were allowed to be appointed by the court to represent the estates of the deceased children for the purpose of the suit (*a*).

Creditor, etc. may summon executor, etc. to show cause why an order for administration of personal estate should not be granted.

Any person claiming to be a creditor, or a specific pecuniary or residuary legatee, or the next of kin, or some or one of the next of kin, of a deceased person, may apply for and obtain as of course, without a bill being filed, or any other preliminary proceedings, a summons from the master of the rolls or any of the vice-chancellors requiring the executor or administrator of such deceased person to attend before him at chambers, for the purpose of showing cause why an order for the administration of the personal estate of the deceased should not be granted; and upon proof by affidavit of the due service of such summons, or on the appearance in person or by his solicitor or counsel of such executor or administrator, and upon proof by affidavit of such other matters, if any, as the judge shall require, he may in his discretion make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require; and the order so made shall have the effect of a decree as though made on the hearing of a cause or claim between the same parties; provided that such judge shall have full discretionary power to grant or refuse the order, or to give any special directions touching the carriage or execution of the same, and in the case of applications for any such order by two

Power to judge to order administration of such estate.

(*a*) Swallow *v.* Binns, 9 Hare, Append. 46; 17 Jur. 295.

CHAP. III.

or more different persons or classes of persons, the judge may grant the same to such one or more of the claimants or of the classes of claimants as he may think fit; and if he shall think proper, the carriage of the order may subsequently be given to such party interested, and upon such terms as he may direct (*b*) (15 & 16 Vict. c. 86, s. 45).

Copy of summons to be filed in record office of court.

A duplicate or copy of such summons shall, previously to service, be filed in the record office of the court; and no service upon any executor or administrator shall be of any validity unless the copy so served shall be stamped with a stamp of the office indicating its filing; and the filing of such summons shall have the same effect with respect to *lis pendens* as the filing of a bill (15 & 16 Vict. c. 86, s. 46).

This power to register the summons as a *lis pendens* will be by virtue of the 2 & 3 Vict. c. 11, s. 7. By referring to the above section 45, it will be seen that a judge's order, under the summons therein mentioned, will have the force and effect of a decree; therefore, in order to charge the estate of the deceased, it ought to be immediately registered, under 1 & 2 Vict. c. 110.

Creditor, etc. may obtain an order for administration of real estate.

Any person claiming to be a creditor of any deceased person, or interested under his will, may apply for and obtain in a summary way, in the manner before provided with respect to the personal estate of a deceased person, an order for the administration of the real estate of a deceased person where the whole of such real estate is by devise vested in trustees who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate; and all the provisions hereinbefore contained with respect to the application for such

(*b*) See *Re* Catling, 20 Law Times, 59.

order in relation to the personal estate of a deceased person, and consequent thereon, shall extend and be applicable to an application for such order as last before mentioned with respect to real estate (15 & 16 Vict. c. 86, s. 47 (*c*)).

This may be considered as a continuation of section 45, which relates solely to personal—this to real estates. It will be perceived that this section expressly refers to where the *whole* of such estate is by devise vested in trustees; from this it would seem, that unless the case should fall expressly under this provision, the proceedings must be by bill.*

Court may direct sale of mortgaged property instead of a foreclosure, on such terms as it may think fit.

The court, in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, is empowered to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the court may think fit to direct; and if the court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem: provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making

(*c*) See 22 & 23 Vict. c. 35, s. 14, giving trustees power to sell where the land is by the will charged with the payment of debts; and see Williams on Real Assets as to what will operate as a charge of debts.

* See Sir G. Turner's Act, 13 & 14 Vict. c. 35, and 23 & 24 Vict. c. 38, s. 14, enabling an executor to *initiate* proceedings and obtain protection against suits and actions by creditors, though not to commence general administration suits.

CHAP. III.

such request shall deposit in court a reasonable sum of money, to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose on the party making such request (15 & 16 Vict. c. 86, s. 48).

This part of the Act will very greatly diminish the expense and delay of foreclosure suits, by the power which it gives the court of directing a sale without determining the priorities of the mesne incumbrances, or of granting to each mortgagee his right to a separate time for redemption (*d*). When an application is made under this section for a sale of the mortgaged estate instead of a foreclosure, it must be applied for at the hearing; and if a decree be then made for foreclosure, it cannot afterwards on motion be converted into a decree for sale (*e*).

Suit not to be dismissed for misjoinder of plaintiffs, but court may modify its decree, according to special circumstances.

No suit shall be dismissed be reason only of the misjoinder of persons as plaintiffs, but wherever it shall appear to the court that, notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the court may grant such relief, and modify its decree, according to the special circumstances of the case, and for that purpose may direct such amendments, if any, as may be necessary, and at the hearing, before such amendments are made, to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants in the suit, and the remaining or other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record; and

(*d*) Anning *v.* Lavers, 20 Law Times, 61; Cator *v.* Reeves, ibid. 105.

(*e*) Girdlestone *v.* Lavender, 20 Law Times, 176.

where there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died leaving a plaintiff on the record without an interest, the court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to a decision of the cause, if it shall see fit, and give such directions as to costs or otherwise as may appear just and expedient (15 & 16 Vict. c. 86, s. 49).

This section speaks for itself, and was acted upon in Clements *v.* Bowes (*f*), where an objection of misjoinder was removed notwithstanding all the plaintiffs were not named upon the record.

No suit to be objected to because only declaratory order sought.

No suit shall be open to objection on the ground that a merely declaratory decree or order is sought, and it shall be lawful for the court to make binding declarations of right without granting consequential relief (15 & 16 Vict. c. 86, s. 50).

Court may decide between some of the parties without making others interested parties to the suit.

The court is empowered to adjudicate on questions arising between parties notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that the property in question is comprised with other property in the same settlement, will, or other instrument, without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument, to be executed under the direction of the court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen: but if the court shall be of

(*f*) 1 Drew. 684; 22 Law Jour. 1022.

CHAP. III.

Proviso.

opinion that the application is fraudulent or collusive, or for some other reason ought not to be entertained, it shall have power to refuse to make the order prayed (15 & 16 Vict. c. 86, s. 51).

This section applies to those cases wherein you have some of the parties interested in the question in every point of view (*g*). But it does not render the decision binding on the absent parties, as the 42nd section does when notice of the decision has been served under the 8th rule (*h*).

In case of abatement, etc. of suit, an order may be made, which shall have same effect as a bill of revivor.

Upon any suit in court becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an order so obtained, when served upon the party or parties, who according to the present practice of the court would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of service be binding on such party or parties in the same manner in every respect as if the order had been regularly obtained according to the existing practice of the court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the clerk of records and writs, within such time and in

(*g*) Per V.-C., in Swallow *v.* Binns, *supra.*
(*h*) Doody *v.* Higgins, 9 Hare, Append. 32.

like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; and it shall be open to the party or parties so served, within the time after service as shall be prescribed by any general order of the lord chancellor, to apply to the court by motion or petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceedings in the suit and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon; and if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for him, and such time shall have elapsed thereafter as shall be prescribed by any general order of the lord chancellor in that behalf (15 & 16 Vict. c. 86, s. 52).

This is one among the many other sections for avoiding delay and expense, and will be found exceedingly beneficial to the suitor (*i*). See 32 Cons. Ord. r. 1, which limits the time wherein parties must apply to discharge the order referred to in this section.

Upon the marriage also of an infant plaintiff, after the decree the trustees of the settlement were brought before the court by a supplemental order; it being held to be a change or transmission of interest within the spirit of the Act, to warrant an order against the trustees to the effect of the usual supplemental order (*k*).

When however more than the common order to revive

(*i*) Jones *v.* Wood, 20 Law Times, 50; Martin *v.* Hadlow, ibid. 59; Yate *v.* Leithead, ibid.; Wilding *v.* Richards, ibid. 60; Atkinson *v.* Parker, ibid. 106; Lowes *v.* Lowes, ibid. 61.

(*k*) Atkinson *v.* Parker, 16 Jur. 1005; 22 Law Jour. 20; Week. Rep. 43.

CHAP. III.

or the usual supplemental decree is required, a supplemental bill must still be filed (*l*).

If an order to revive only be necessary, and not an order to the effect of a supplemental decree, the motion is of course, and need not be mentioned to the court (*m*).

Where the defendant, against whom the order to revive has been obtained under the 52nd section, was out of the jurisdiction, but had left with his solicitor a full power of attorney, substituted service of the order to revive upon his solicitor was ordered; and no appearance having been entered in pursuance of it, the court gave the plaintiff leave to enter an appearance for him under the 29th Ord., May, 1845 (*n*). But it has since been decided that there is no necessity for the plaintiff to enter an appearance for the defendant at all, the suit being considered as standing revived upon service of the order to revive (*o*).

Where the sole plaintiff to a suit had died, and numerous defendants had appeared by their solicitors, which circumstance rendered it difficult and expensive to serve them personally, an order to revive, authorizing service upon the solicitors, was allowed by the court (*p*).

(*l*) Yate *v.* Leithead, 16 Jur. 964; Martin *v.* Hadlow, ibid. 964; 22 Law Jour. 9; 9 Hare, Append. 52.

(*m*) Bonfil *v.* Purchas, ibid.; 16 Jur. 965.

(*n*) Forster *v.* Menzies, Week. Rep. 344; 17 Jur. 657; *vide* also Cross *v.* Thomas, ibid. 336.

(*o*) Ward *v.* Cartwright, ibid. 781; 10 Hare, Append. 36; Week. Rep. 520.

(*p*) Morritt *v.* Walton, 2 Week. Rep. 643.

CHAPTER IV.

OF THE SEVERAL KINDS OF BILLS.

Divisions of bills.

We shall enter upon this part of the subject by observing the divisions laid down by most writers on equity, and which are considered as threefold,—I. Original bills; II. Bills not original; and, III. Bills in the nature of original bills.

I. Original bills are divided into bills praying relief and those not praying relief.

Original bills praying relief;

Original bills *praying relief* are divided into,—1. Such as pray the decree of the court touching some right claimed by the plaintiff in opposition to the defendant; 2. A bill of interpleader; 3. A certiorari bill.

not praying relief.

Original bills *not praying relief* are,—1. A bill for discovery; 2. A bill to perpetuate the testimony of witnesses.

The form of every bill bears a resemblance to the original bill, although they must necessarily vary according to the purposes for which they are framed (*a*).

1. Original bills are so called because they relate to a subject-matter which has not been before controverted in the court between the same parties, standing in the same interests. They are similar in their nature to a declaration at common law (*b*), or to a libel or allegation in the spiritual court (*c*). All the others are generally deducible from, or are in some manner connected with them.

(*a*) Mitf. 47. (*b*) 3 Bl. Com. 442.
(*c*) 3 Gilb. For. Rom. 44.

CHAP. IV.

Interpleader.

2. *A bill of interpleader*, on which we have made some previous remarks, is where the plaintiff, not having any interest in the subject-matter of litigation, but of which he is possessed, fears he may suffer injury by two or more persons claiming the same thing by different interests. The bill prays that the rival parties may interplead or contest their doubtful claims, that the court may decide to whom the thing belongs, and that the plaintiff may be indemnified. An affidavit denying collusion between the plaintiff and any of the interpleading parties must be affixed to the bill, because the principal object of the plaintiff is, or ought to be, to avoid involving himself in difficulties, which might arise by delivering over the subject of contention to the party not entitled to it, or being vexed with a multiplicity of actions brought against him by the other claimants. If the plaintiff be in possession of any sum of money which forms the subject of the suit he must bring it into court, or offer to do so by the bill (*d*).

Certiorari.

3. *A bill of certiorari* is exhibited when a suit is commenced in an inferior court of equity, and the defendant to such suit is apprehensive that he cannot have complete justice by reason of the limited jurisdiction of that court, or that the court itself has no jurisdiction (*e*). Formerly, many applications were made by poor suitors and strangers, on the ground that the proceedings in the inferior court of common law jurisdiction were likely to be distorted into oppression by reason of the plaintiffs' destitution or poverty, and the wealth of their opponents influencing or intimidating both judge and jury, maintenance or champerty, or combination and confederacy of the defendants : a relic of the latter ground of application was, until the 15 & 16 Vict. c. 86, retained in almost

(*d*) Coop. 50; Meux *v.* Bell, 6 Sim. 175.
(*e*) Mitf. by Jer. 61; Coop. 50.

every hostile bill in Chancery. The bill is nominated after the special writ which it prays, *i. e.*, the writ of *certiorari* to remove the cause from an inferior court of equitable jurisdiction into the Court of Chancery. Unlike the generality of bills under the old practice, it did not pray that the defendant might answer or appear to the bill, therefore it did not ask that a subpœna might issue. Should the court see fit to remove the cause from the inferior court within its own immediate jurisdiction, the bill which is filed in the latter court is considered as an original bill in Chancery, and process is issued thereon as such. The plaintiff below cannot file such bill nor can it be filed after decree (*f*).

Partition.

A bill of partition is an original bill, and is filed for the purpose of obtaining the judgment of the court as to the rights of the several parties, and the proportions to which they are entitled; and also for the sake of procuring a division of such proportions. The costs of the commission are borne by the several parties to the suit in proportion to the value of their respective interests (*g*).

Foreclosure.

A bill of foreclosure is also an original bill, which is filed by a mortgagee when the deed does not contain a power of sale; its object is to obtain the direction of the court for payment of the principal and interest due to the mortgagee, and in default thereof that the mortgagor may be foreclosed from his equity of redemption.

(*f*) Id., and see Jones *v.* Hey and Hey *v.* Bate, 17 W. R. 996, as to such bills. And see County Court Consol. Ord., Eq. No. 18, as to removal of suits to Chancery, where the amount in question turns out to exceed £500.

(*g*) See the Partition Act, 1868, authorizing the court to direct a sale instead of a partition in certain cases, and see Teall *v.* Watts, 11 L. R., Eq. 213, as to procedure under it where some of the parties interested are abroad.

It is not necessary, however, to enumerate and describe all the sorts of original bills, whether seeking relief or not, but it may not be out of place to insert a passage upon this subject from Mr. Daniell's Practice, vol. 1, p. 201, 3rd edit., wherein, in reference to the modern practice introduced by the provisions made by the statute 15 & 16 Vict. c. 86, he says: "It has been usual in former treatises concerning the practice of the court to make an elaborate analysis of the different kind of bills, dividing them into original bills praying relief and original bills not praying relief, and then making various sub-divisions of these two classes of bills. The comparative simplicity of all modern proceedings renders all such minute sub-divisions trifling and unimportant. As courts of law are now armed with the power of obtaining discovery from the defendant, bills for mere discovery, though still possible, will probably become obsolete. All other bills (including even bills to perpetuate testimony, which are still probable) are bills for relief of various descriptions. The length of time during which suits formerly lasted, and the number of parties to them, gave rise to a large class of bills, called bills of revivor, bills of revivor and supplement, original bills in the nature of bills of revivor, &c. The varieties of practice incident to the different modes by which suits may now become defective will be hereafter stated; but it may be stated generally that the short duration of suits, the small number of parties, and the facility with which, according to the existing practice, amendments are made and defects remedied, have rendered almost obsolete the refinements and distinctions of former treatises upon the subject."

Effect of changes in the practice of the court on the different forms of pleadings. 15 & 16 Vict. c. 86.

But whilst it is admitted that the Act 15 & 16 Vict. c. 86, was intended and certainly has the effect of affording greater latitude to parties to save themselves the expense and delay of filing supplemental bills by simple amendment in the generality of cases before the court,

and substituting a new system known as revivor orders and supplemental statements by sects. 52 and 53 of the Act, yet the former practice is by no means rendered obsolete, for under these last-mentioned sections a number of important decisions have been given, as to the cases when these provisions are applicable or not.

Bills not praying relief.

I. A bill for discovery only is ended by the answer and is not brought to a hearing. II. A bill to perpetuate testimony is one to obtain the examination of witnesses whose evidence may from old age or otherwise be in danger of being lost before a claim can be instituted or brought to an issue.

No abatement in case of an information.

It appears that a suit does not abate by the death or outlawry or lunacy of a relator; but, in such an event, the court will suspend further proceedings until another relator be appointed: neither in a creditor's suit do the proceedings abate by the death of a plaintiff (*h*).

Decree provides for the rights of all parties to the suit.

When the rights of the parties are clearly ascertained by a decree, both plaintiffs and defendants are equally entitled to the benefit of the decree; therefore, where, in case of an abatement after a decree, the plaintiffs neglect to revive, it is competent for any of the defendants to obtain an order of revivor, to bring the necessary parties before the court. The death of a sole plaintiff abates the suit. If he die before the decree, and his representatives do not revive, the defendant will not be allowed to revive for his costs; and in this respect he will be remediless (*i*).

No abatement in the case of joint tenants.

If one of two joint tenants die after the commencement of the suit, this is no abatement of the suit (*k*), because the interest of the one so dying survives to the other; so if one release, it will not abate the suit as to the other: neither does the death of the plaintiff in an interpleader

(*h*) 2 Madd. Ch. Prac.

(*i*) 2 Freem. 6.

(*k*) Andrews *v.* Lockwood, 10 Jur. 277.

suit after decree abate the proceedings; for the decree determines his interests, and each of the defendants is considered in the character of plaintiff.

When suit abates by death of a sole plaintiff.

Where a suit abates by the death of a sole plaintiff, the court, upon motion of any defendant made, on notice served on the legal representative of the deceased plaintiff, may order such legal representative to revive the suit within a limited time, or that the bill be dismissed (*l*). The creditors of a bankrupt may have the same remedy against the assignees; for, although the bankruptcy or insolvency of either a plaintiff or defendant does not cause an abatement, yet the suit is so far defective, that it cannot be proceeded with until the assignees are brought before the court.

A defendant, or his representative, may in all cases revive, where he or they can derive a benefit from the ulterior proceedings (*m*). The 52nd section of 15 & 16 Vict. c. 86, *supra*, without abolishing the old practice, has considerably extended the rights of parties to expedite proceedings in cases where a bill of revivor was deemed to be necessary. See also section 44, *supra*. But it would seem that the benefit of this section is only intended to assist parties to a suit where, owing to insolvency or some such cause, there is a difficulty in obtaining representation to a deceased person interested in the matters in question in the suit; as in the case of Long *v.* Storie (*n*), which was a foreclosure suit giving several persons a right to redeem within a certain period. Before the time arrived, one of the number had died, and some difficulty having arisen in the ecclesiastical court about obtaining administration to the deceased, one of the creditors took out letters of administration; but before proceedings were perfected, another creditor en-

(*l*) 32 Cons. Ord. r. 4.
(*m*) 2 Madd. Ch. Prac.
(*n*) 1 Kay, Append. 12.

tered a caveat. Notwithstanding these circumstances, the court allowed the former creditor, who had almost obtained representation, to represent the estate of the deceased for the purposes of the suit (*o*). In a case, also, where the deceased was tenant for life of tithes, and who had died intestate, and there being no personal representative, his widow, by the concurrence of several judges of the court, was ordered to appear and represent her deceased husband's estate and effects, for all the purposes of the suit (*p*).

Under some circumstances, where there is a contest in the ecclesiastical court as to probate, the Court of Chancery has, upon motion, appointed the executor named in the will to represent the deceased for all purposes of the suit (*q*). But this does not apply to a case where the personal representative of a deceased trustee has active duties to perform in the execution of the trusts, or in any decree which the court might make (*r*).

Cross bill.

1. *A cross bill* is that which is exhibited by a defendant in a suit against the plaintiff, or other parties, touching some matter in litigation in that suit, either to obtain a discovery or full relief to all parties; for, as a defendant could not in equity examine a plaintiff as a witness, he might only obtain his testimony by filing a cross bill against him (*s*). A cross bill being considered as a defence, or a proceeding for the purpose of obtaining a complete determination of a suit already pending in court, and the plaintiff to the cross bill being already drawn into court, as defendant to the original suit, he may avail him-

(*o*) Dean and Chapter of Ely *v.* Edwards, 10 Hare, Append. 65; 17 Jur. 219.

(*p*) See also 23 Law Jour. 200.

(*q*) Hele *v.* Bexley, 15 Beav. 340.

(*r*) Fowler *v.* Bayldon, 9 Hare, Append. 78.

(*s*) 1 P. Wms. 595.

self of the assistance of the court, without being bound to show any ground of equity to maintain its jurisdiction (*t*).

When any question arises between two or more defendants, so that a complete decree cannot be made unless a cross bill be filed, it is necessary for one or more of the defendants to the original cause to proceed against the plaintiff and the rest of the defendants, or against as many of them as shall be deemed proper parties in a cross suit, to bring the disputed point before the court.

The 19th section of the 15 & 16 Vict. c. 86, will greatly lessen the necessity for cross bills. Although cases may still arise in which for the sake of having full justice, the defendant must resort to the old practice; as for example, where the defendant requires the production of documents in the possession of a co-defendant, a cross bill must be filed (*u*). By the above section it shall be lawful for any defendant in any suit, which the defendant is required to answer, not until after he shall have put in a sufficient answer to the bill, and without filing any cross bill of discovery, to file in the record office of the said court interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subjects on which a discovery is sought, and to deliver a copy of such interrogatories to the plaintiff or his solicitor; and such plaintiff shall be bound to answer such interrogatories, in like manner as if the same had been contained in a bill of discovery filed by the defendant against him on the day when such interrogatories shall have been filed, and as if the defendant to such bill of discovery had on the same day duly appeared; and the practice of the court with reference to excepting to answers for insufficiency, or for scandal, shall extend and be applicable to answers put in

In certain cases defendant, after answer, may file interrogatories for examination of plaintiff.

(*t*) Mitf. 81.

(*u*) Attorney-General *v.* Clapham, 10 Hare, Append. 45.

to such interrogatories; provided that in determining the materiality or relevancy of any such answer, or of any exception thereto, the court is to have regard, in suits commenced by bill, to the statements contained in the original bill, and in the answer which may have been put in thereto by the defendant exhibiting such interrogatories for the examination of the plaintiff, and in suits commenced by claim,* to the statements therein, and in any affidavits which may have been filed either in support thereof or in opposition thereto: provided also, that a defendant, if he shall think fit so to do, may exhibit a cross bill of discovery against the plaintiff, instead of filing interrogatories for his examination.

Defendant may exhibit a cross bill instead of filing interrogatories.

In all cases where a cross bill is filed, the plaintiff to the former suit is entitled to an answer to his bill before he can be called upon to put in his answer to the cross suit; for this purpose he must move for an order to stay proceedings therein, until the answer has been filed to the original bill (*x*). But if the plaintiff amend his original bill, subsequently to the cross bill being filed, he waives his priority, provided the amendments be such as require an answer (*y*).

Plaintiff in former suit entitled to priority.

When a suit already pending is insufficient to exhibit the rights of all the parties, together with every matter essential to the full determination of the question in dispute; if such determination be necessary to a complete decree, the court will order a cross bill to be filed for this purpose (*z*).

The answer to a cross bill filed for discovery cannot be taken, and made to form part of the original answer; but the defendants to the original bill, having obtained the

* Claims are now abolished, Cons. Ord. 8, r. 4.

(*x*) Noel *v.* King, 2 Madd. 392.

(*y*) Long *v.* Burton, 2 Atk. 218.

(*z*) Mitf. 83.

discovery, should move for leave to file a supplemental answer (*a*).

Where a defendant in equity files a cross bill for discovery only against the plaintiff in equity, the answer thereto may be read and used by the party filing such cross bill, in the same manner as the answer to a bill praying relief may now be read and used (*b*).

Original and cross cause heard together.

It is usual to bring on the original and the cross cause for hearing at one and the same time; and, for this purpose, the plaintiff to the cross bill is allowed, upon motion or petition, as of course, to have his cause advanced so as to be heard with the original suit; but he must set his cause down in the same court in which the original cause is set down.

Bill of review.

2. If, after a decree has been *signed* and *enrolled*, a party is not satisfied therewith, but seeks to reverse it, he must file his *bill of review*, which can only be done upon two grounds,—1. Where an error in *law* is apparent in the body of the decree; 2. Upon the discovery of any new matter or *fact* since the decree, and which could not have been used when the decree was made (*c*).

Petition of re-hearing.

If the decree has not been signed and enrolled, and there is error apparent therein, the party impugning it may present his *petition of re-hearing;* but if the decree be sought to be reversed on new facts, previous to its being signed and enrolled, he must proceed by means of *a supplemental bill* in the nature of a bill of review, which is filed for the purpose of supplying the defect which caused the error in the decree upon the former bill.

(*a*) The Warden and Minor Canons of St. Paul's *v.* Kettle, Vea. & B. 16.

(*b*) 42 Ord., 26th Aug. 1841, and 19 Cons. Ord. r. 6.

(*c*) Beames' Ord. 2; Hungate *v.* Gascoigne, 15 Law Jour. (N. S.) Ch. 142.

If a bill of review seek to reverse a decree upon error apparent therein, it is not necessary to obtain leave of the court for that purpose; but where a party seeks to reverse the decree upon new facts, subsequent to publication, leave of the court must first be obtained; and, therefore, in filing a bill of this nature, wherein is stated the former bill and the proceedings thereon, the decree, the point of grievance, and the matter discovered, it is also necessary to state the leave of the court to exhibit the same * (*d*). But a supplemental bill, filed for the purpose of carrying out a decree, does not require any averment that the matter contained in such bill had been discovered since publication, or since the original decree was pronounced. A supplemental bill, in aid of a decree, cannot vary the principle of the decree, but takes that as its basis, supplying any omissions in the decree to enable the court to give full effect to its decision; as in a decree for an account, where the supplemental bill is filed for the want of full directions given in the decree before (*e*).

After the expiration of twenty years from the date of the decree which has been signed and enrolled, a bill of review will not be allowed (*f*), unless where the parties labour under disabilities (*g*).

It seems to be necessary to entitle a person to file his bill of review that he should have performed the decree in the former bill; or he must show his inability to do so.

A bill in the nature of a bill of review.

3. *A bill in the nature of a bill of review* is brought in consequence of error in the decree, where it is pro-

* Bills of review are seldom resorted to of late years, owing to the circumstance that decrees are seldom enrolled. *Vide* Truelock *v.* Roby, 11 Jur. 601, *n.*

(*d*) 1 Vern. 292.

(*e*) Hodson *v.* Bull, Dec. 22, 1842, C. C.

(*f*) Mitf. 88.

(*g*) 2 Madd. Ch. Pr.

CHAP. IV.

nounced against a party who has no interest in the subject of litigation, or such a degree of interest as was not sufficient to render the decree against him binding on some other person claiming the same interest (*h*).

Decree obtained by fraud.

4. *A bill to impeach a decree which has been obtained by fraud* is an original bill; and, as the fraud made use of for procuring the decree is the principal object to be shown, which can only be done by evidence, it is not necessary for that purpose to obtain leave of the court: and it is of no consequence that the decree was by consent of the parties impeaching it, provided such consent was obtained by fraud. A decree improperly obtained against infants must be impeached by original bill, although no fraud attended the procuring of the decree (*i*).

To suspend the operation of decrees.

5. *A bill to suspend the operation of decrees* on special circumstances, or to avoid them on the subsequent discovery of new matter, being only had recourse to in cases of urgent necessity, is of course but little used, and forms no precedent for matters of an ordinary nature; it is, therefore, only mentioned in this place for the sake of order.

To carry a decree into execution.

6. *A bill to carry a decree into execution* is brought in cases where the parties have neglected to obey the decree, whereby their various rights under it have fallen into such confusion and embarrassment by subsequent events as to render it impossible to carry the decree into execution, without the further aid of the court to ascertain them.

(*h*) Mitf. 92. (*i*) 1 P. Wms. 737.

CHAPTER V.

FILING BILL—LIS PENDENS—SUMMONS TO DEFENDANT—OLD FORM OF PROCEEDING BY SUBPŒNA—NEW FORM BY SERVICE OF PRINTED COPY OF BILL.

Lis pendens, effect of.

UNTIL the passing of the 2 & 3 Vict. c. 11, as soon as a bill was filed it was considered as being, to all intents and purposes whatever, notice to all the world, and was technically denominated a *lis pendens*. If, therefore, a purchaser, however innocently, bought an estate which had become the subject of litigation in this court by means of a bill which had been put upon the file even the very day before the purchase, such purchaser was made a party to the record, and instantly became involved in all the consequences of the suit in respect of his interest in such estate, and became also subject to the decree, as if the suit had been originally instituted against him. To remedy so glaring an evil, and to protect *bonâ fide* purchasers from being taken by surprise, the above statute was passed, which (sect. 7) declares that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior master of the Court of Common Pleas, who shall forthwith enter

2 & 3 Vict. c. 11, s. 7.

CHAP. V.

the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*.

Subpœna;

As soon as the bill was filed, the next step for the plaintiff to take, before the passing of the 15 & 16 Vict. c. 86, was to compel the defendant's appearance and answer by serving him with a subpœna, which was prayed for in the bill. The subpœna was a writ issuing out of and under the seal of the Court of Chancery, commanding the defendant to appear within eight days under certain pains and penalties therein specified.

As the rules relating to the service of the printed bill under the new system are similar to the service of the subpœna to appear under the old, it may be advisable to state briefly something respecting the former process.

not issued until bill filed.

Previously to issuing a subpœna, under the old practice, it was necessary that a bill should be filed, for until the bill was on the file there was no cause existing to which the defendant could appear; but in certain cases of injunction, if the bill had been filed on the return-day of the subpœna, it was sufficient.

Subpœna.

By an Order 21st December, 1833, each subpœna, other than a *subpœna duces tecum*, must not contain more than three names where it is necessary or required to serve three or more defendants. A husband and wife were reckoned as *one* unless the separate estate of the wife were sought to be charged, in which case it was necessary for her to be separately served (*a*).

If the defendant had appeared and put in his answer, and the plaintiff amended his bill, he had to issue a fresh subpœna (*b*); but if the defendant appeared and before answer the plaintiff amended his bill, a fresh subpœna

(*a*) 2 Madd. Ch. Pr.

(*b*) Skeffington *v.* ——, 4 Ves. 66.

was not necessary, neither was the plaintiff required to serve the defendant with a further subpœna where a demurrer or plea had been overruled.

Labels of subpœna used to be personally served.

Formerly the labels only were required to be served on each defendant personally, and the body under seal shown to them at the time of such service; but the body itself might always have been served personally, or left at the house of the other person, according to the convenience of the plaintiff (*c*). Afterwards it was ordered that the service of subpœnas should be effected by delivering a copy of the writ and of the indorsement thereon, and at the same time producing the original writ: or, if it were not served personally, it was sufficient to leave a copy of such subpœna at the party's dwelling-house, producing the original writ to the person with whom such copy was so left (*d*).

Service at dwelling-house now sufficient.

When bill amended service on defendant's solicitor.

Service of a subpœna upon a defendant's solicitor, to answer an amended bill or to hear judgment, was, and the latter is, to be deemed good service upon the party (*e*).

Service on a peer.

Where the defendant claimed the privilege of peerage, a petition had to be presented to the secretary of the lord chancellor, praying for a letter missive returnable immediately; a copy of which, together with an office copy of the bill and a copy of the petition, were then served on the peer, either personally or at his place of abode: this service was followed up by a subpœna, unless he entered his appearance within eight days.

4 & 5 Will. IV. c. 82, s. 2.

By 4 & 5 Will. IV. c. 82, s. 2, where it is made to appear to the satisfaction of the court, in any such suit as therein mentioned,* that the defendant cannot be served

(*c*) Beam. Ord. 171.

(*d*) Ord. 21st Dec. 1833.

(*e*) Ord. 26, 8th May, 1845, and 28 Cons. Ord. r. 7.

* *i.e.* Suits concerning any lands, tenements or hereditaments, in England, Wales or Ireland, or any charge, lien, judgment or en-

CHAP. V.

in consequence of his secreting or withdrawing himself with the view to avoid such service, the court might order that the service of the subpœna should be substituted in such manner as it might direct.

Before the passing of the 8 Vict. c. 16 "(The Companies Clauses Consolidation Act, 1845"), if the suit were against a corporation, the subpœna might be served upon any of its members; but by section 135 of that Act it is provided, that any proceedings at law or in equity requiring to be served upon the company, may be served by the same being left at, or transmitted through the post directed to the principal office of the company, or one of their principal offices, where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company. By "The Railway Clauses Consolidation Act, 1845," 8 Vict. c. 20, s. 138, a similar provision is made for the service of process upon railway companies. By "The Lands Clauses Consolidation Act, 1845," 8 Vict. c. 18, a like provision is made by sect. 134 for the service of process upon the promoters of any works or undertaking which shall, by any Act to be thereafter passed, be authorized to be executed; in which case the process may be served by being left at or transmitted through the post directed to the principal office of the promoters of the undertaking, or one of the principal offices where there shall be more than one, or being given or transmitted through the post directed to the secretary, or, in case there be no secretary, the solicitor of the said promoters. By the 17 & 18 Vict. c. 25 ("An Act to amend the Industrial and Provident Societies Act, 1852"), service may be effected by leaving the same at the head office for the time being

cumbrance thereon, or concerning any money vested in any government or other public stock, or public shares in public companies or concerns, or concerning the dividends or produce thereof.

of the society; or in case he shall not be found or known, then service on any agent or officer employed by the said society, or by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient notice of the same respectively on such society (*f*).

It has been the practice of the court under peculiar circumstances to allow of what is called substituted service, or, in other words, to admit of a subpœna to appear to be made upon some person other than the defendant, where it has been found inconvenient or impossible to serve the defendant himself; but in all cases of substituted service the court seems to have been guided by the fact of an actual or presumed agency involving a fair inference that some communication existed between the defendant and the party upon whom service of process was directed to be made (*g*); for where there was no sufficient proof to show agency on the part of the attorney, an application to substitute service upon him was refused, notwithstanding he had recently acted as the attorney and solicitor of the defendant in certain proceedings both at law and in equity, to avoid the consequences of which the defendant had absconded, and was then living out of the jurisdiction (*h*).

Subpœna on Sunday.

A subpœna served on a Sunday was irregular, and any

(*f*) And see 25 & 26 Vict. c. 89, ss. 62, 63, as to service under the new practice of a bill upon a joint-stock company by leaving it or sending it by post to the registered office, or giving it to the secretary, or, if no secretary, to one of the directors of the company.

(*g*) Hibernian Mining Company, 1 Sch. & Lef. 239; Bromley *v.* Bank of England, 7 Jur. 120; Thomas *v.* Selby, 15 Law Jour. 280; Murray *v.* Vipart, 14 Law Jour. 217; Hobhouse *v.* Courtney, 12 Sim. 140; Hornby *v.* Holmes, 4 Hare, 306; 9 Jur. 225, 796; Hunt *v.* Lever, 5 Ves. 147; Kinder *v.* Forbes, 2 Beav. 503; Pulteney *v.* Shelton, 5 Ves. 147; Lane *v.* Hardwicke, 5 Beav. 222.

(*h*) Cope *v.* Russell, 16 Law Jour. 369; 11 Jur. 463.

CHAP. V.

proceedings founded on such service might have been set aside for irregularity (*i*).

We now come to the more recent practice which has been adopted under the 15 & 16 Vict. c. 86, through the recommendation of the chancery commissioners. Section 2 abolishes the writ of subpœna to appear to and answer a bill of complaint. And, in lieu of serving the defendant with a writ of subpœna to appear to and answer a bill of complaint, the defendant must now be served with a printed bill of complaint, with an indorsement thereon in the form or to the effect set out in the schedule to the Act, with such variations as circumstances may require, the same being previous to service duly stamped by one of the clerks of the records and writs (sect. 3).

The filing of a printed bill of complaint shall have the same effect as the filing of a bill of complaint in court and the former issuing of a writ of subpœna, and the service of a printed bill, so filed, upon the defendant, with such indorsement thereon and stamped as aforesaid, shall have the same effect as the service on him of a writ of subpœna once had, and shall entitle the plaintiff to such remedies for default of appearance and otherwise as he is now entitled to in case of due and proper service of a subpœna, to appear to and answer a bill of complaint (sect. 4). The service upon a defendant of a printed copy of a bill of complaint is now effected in the same manner as the service of a writ of subpœna to appear to and answer a bill of complaint formerly was, save only that it shall not be necessary to produce the original bill, which will be on the files of the court: but the court is at liberty to direct substituted service of the printed bill, in such cases and manner as it shall think fit (sect. 5).

Written copies of

Notwithstanding the provisions hereinbefore con-

(*i*) 19 Ves. 367.

tained, the clerks of records and writs may receive and file a written copy of any bill of complaint praying a writ of injunction or a writ of *ne exeat regno*, or filed for the purpose either solely or among other things of making an infant a ward of court, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy of such bill within fourteen days, and every bill of complaint so filed shall be deemed and taken to have been filed at the time of filing the written copy thereof; and a written copy of any such bill of complaint, stamped and indorsed as aforesaid, may be served on any defendant thereto, and such service shall have the same effect as the service of a printed copy (sect. 6).

Bills may be served, in certain cases, upon plaintiff undertaking to file a printed copy in fourteen days.

Before the name of any such person shall be used in any suit to be instituted in the said court as next friend of any infant, married woman, or other party, or as relator in any information, such person shall sign a written authority to the solicitor for that purpose, and such authority shall be filed with the bill, information, or claim (sect. 11).

Person whose name is used as next friend of any infant, etc., in any suit, etc., to sign a written authority.

This clause is intended to put a restraint upon persons filing bills on behalf of infants, married women, etc., without their consent, and which has often brought innocent parties into a scandalous scene of litigation, especially when the *prochein ami* of an infant plaintiff happened to be a pauper.

CHAPTER VI.

SERVICE OF BILL—SUBSTITUTED SERVICE—CONS. ORDERS—NO ATTACHMENT OR SERJEANT-AT-ARMS TO COMPEL APPEARANCE—CONTEMPT OF COURT—FORMAL PARTIES.

By the 10th Cons. Ord. r. 1, service of every copy of a bill shall be effected by serving such copy personally or by leaving the same with a servant of the defendant or some member of his family, at his dwelling-house or usual place of abode, unless the court directs some other mode of service.

I. *In the Case of Parties generally.*

10 Cons. Ord. Rule 2. Substituted service.

2. The court may direct substituted service of a copy of a bill to be served under the stat. 15 & 16 Vict. c. 86, in cases in which, according to the practice of the court, existing at the time of the passing of that statute, substituted service of a *subpœna* to appear to and answer a bill might have been directed (10 Cons. Ord. r. 2).

Rule 3. Time for appearance.

3. Where a defendant within the jurisdiction of the court is served with a copy of a bill in manner provided by the stat. 15 & 16 Vict. c. 86, s. 3, he must appear thereto within eight days after the service of such copy of the bill; otherwise an appearance may be entered for him, as provided by the next rule of this Order (10 Cons. Ord. r. 3) (*a*).

(*a*) A defendant not required and not desiring to answer an *amended* bill need not appear again to it. Barry *v.* Croskey, 2 J. & H. 130.

Rule 4. Where appearance may be entered by plaintiff for defendant within jurisdiction.

4. Where any defendant, not appearing to be an infant or a person of weak or unsound mind, unable of himself to defend the suit, is, when within the jurisdiction of the court, duly served with a copy of the bill, under the stat. 15 & 16 Vict. c. 86, s. 3, and refuses or neglects to appear thereto within eight days after such service, the plaintiff may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the record and writ clerk to enter an appearance for such defendant; and, no appearance having been entered, the record and writ clerk shall enter such appearance accordingly, upon being satisfied by affidavit that the copy of the bill was duly served. And after the expiration of such three weeks, or after the time allowed to such defendant for appearing, has expired, in any case in which the record and writ clerk is not hereby required to enter such appearance, the plaintiff may apply to the court for leave to enter such appearance for such defendant; and the court, being satisfied that the copy of the bill was duly served, and that no appearance has been entered for such defendant, may, if it so thinks fits, order the same accordingly (10 Cons. Ord. r. 4).

Rule 5. Not if defendant an infant or *non compos mentis*.

5. Any appearance entered at the instance of the plaintiff for a defendant, who, at the time of the entry thereof, is an infant or a person of weak or unsound mind, unable of himself to defend the suit, is irregular and of no validity (10 Cons. Ord. r. 5).

Rule 6. Where appearance may be entered by plaintiff for defendant absconding.

6. Where the court is satisfied by sufficient evidence that any defendant has been within the jurisdiction of the court at some time not more than two years before the bill was filed, and that such defendant is beyond the seas, or that, upon inquiry at his usual place of abode (if he had any), or at any other place or places where at the time when the bill was filed he might probably have been met with, he could not be found so as to be served with a

CHAP. VI.

copy of the bill, under the stat. 15 & 16 Vict. c. 86, s. 3, and that in either case there is just ground to believe that such defendant has gone out of the realm or otherwise absconded to avoid being served with such copy of the bill or with other process, the court may order that such defendant do appear at a certain day to be named in the order; and a copy of such order, together with a notice to the effect set forth at the end of this rule, may, within fourteen days after such order made, be inserted in the "London Gazette," and be otherwise published as the court shall direct. And where the defendant does not appear within the time limited by such order, or within such further time as the court may appoint, there, on proof made of such publication of the said order, the court may order an appearance to be entered for the defendant on the application of the plaintiff.

Notice.—"A. B., take notice, that if you do not appear pursuant to the above order, the plaintiff may enter an appearance for you, and the court may afterwards grant to the plaintiff such relief as he may appear to be entitled to on his own showing" (10 Cons. Ord. r. 6).

Rule 7. Art. (1.) Service of copy of bill and of interrogatories on defendant out of jurisdiction, and entering appearance for him.

7. Where a defendant in any suit is out of the jurisdiction of the court,

(1.) The court upon application supported by such evidence as shall satisfy the court in what place or country such defendant is or may probably be found, may (*b*) order that a copy of the bill (*c*), under the stat. 15 & 16 Vict. c. 86, s. 3, and, if an answer is required, a copy of the interrogatories, may be served on such defendant in such place or

(*b*) It is in the discretion of the court; see Morg. Ch. Ord. 425.

(*c*) See Morg. Ch. Ord. 425, that not only bills, but subsequent process and notices, and administration summonses and notices of decrees (but not a petition under the Trustee Acts) may be so served.

country or within such limits as the court shall think fit to direct (*d*).

Art. (2.)

(2.) Such order shall limit a time after such service within which such defendant is to appear to the bill; such time to depend on the place or country within which the copy of the bill is to be served. And where an answer is required, such order shall also limit a time within which such defendant is to plead, answer, or demur, or obtain from the court further time to make his defence to the bill.

Art. (3.)

(3.) At the time when such copy of the bill shall be served, the plaintiff shall also cause such defendant to be served with a copy of the order giving the plaintiff leave to serve such copy of the bill.

Art. (4.)

(4.) And if, upon the expiration of the time for appearing, it be shown to the satisfaction of the court that such defendant was duly served with such copy of the bill and with a copy of the order, the court may, upon the application of the plaintiff, order an appearance to be entered for such defendant (10 Cons. Ord. r. 7).

Rule 8. Affidavits of service.

8. Affidavits filed for the purpose of proving the service of a copy of a bill upon any defendant, shall state when, where, and how the same was served, and by whom such service was effected (10 Cons. Ord. r. 8).

Rule 9. Appearance entered by

9. A defendant, notwithstanding that an appearance may have been entered for him by the plaintiff, may

(*d*) Under this rule, service out of the jurisdiction may be effected in *any* suit, and not merely in the suits mentioned in 2 Will. IV. c. 33 and 4 & 5 Will. IV. c. 82; Drummond *v.* Drummond, 2 L. R., Eq. 335; 2 L. R., Ch. Ap. 32; overruling Cooknay *v.* Anderson, 31 Beav. 452; 1 De G., J. & S. 365, and other cases; and see Blake *v.* Blake, 18 W. R. 944, as to jurisdiction to entertain the suit in such cases.

CHAP. VI.

defendant after appearance entered for him.

afterwards enter an appearance for himself in the ordinary way; but such appearance by such defendant shall not affect any proceeding duly taken or any right acquired by the plaintiff under or after the appearance entered by him, or prejudice the plaintiff's right to be allowed the costs of the first appearance (10 Cons. Ord. r. 9).

Rule 10. Attachment, messenger, and serjeant-at arms to compel appearance.

*10. No attachment for want of appearance shall hereafter be issued, without a special order of the court; and no order shall be made for a messenger, or for the serjeant-at-arms, to take the body of the defendant, for the purpose of compelling him to appear to the bill (10 Cons. Ord. r. 10).

The writ of attachment is directed to the sheriff or other chief officer of the county or jurisdiction where the defendant happens to be, commanding him to attach the defendant, and have him brought before the court at the return of the writ.

Attachment, when deemed to be sealed.

An attachment is considered as sealed from the first moment of the day on which it issues, and consequently takes precedence of an appearance which may have been entered on the same day (*e*).

An attachment sealed before the defendant is in contempt is irregular, notwithstanding it may not be executed, nor even delivered out, until after the defendant is in contempt.

The process of attachment for want of *appearance* is almost obsolete, now that plaintiff can enter an appearance for defendant and proceed to take the bill *pro confesso*, or can, if an answer is required, attach him for not answering; and (*f*) the special leave which this order for the first time renders necessary is not always granted,

(*e*) Stephens *v.* Neal, 1 Madd. 550.

(*f*) Hackwood *v.* Lockerby, 7 De G., M. & G. 238.

and it is of little use, therefore, to trace further the proceedings under such an attachment.

Why issued.

Attachments are issued for non-appearance, for default in answering, for want of compliance with the orders of the court, for non-payment of money, and other acts of disobedience.

Contempts of court; how divided.

Having spoken of a defendant's contempt for want of appearance, it will be sufficient to observe that contempts of court are fourfold;—1. Disobedience to the processes of the court; 2. Not obeying the orders or decrees of the court; 3. Committing acts against the dignity of the court, or against or without its authority, or abusing parties concerned in causes, or persons serving processes, or abusing the process of the court; 4. Scandalizing the court, or prejudicing the public against parties in a suit before the cause has been heard (*g*). But every suitor prosecuting a contempt must use all diligence to procure each process to be duly executed, and his wilful neglect appearing to the court, the offender must pay the aggrieved party good costs, and lose the benefit of the process returned without such endeavour (*h*).

II.—*In the Case of Formal Parties.*

10 Cons. Ord. Rule 11. Service of copy of bill on formal parties.

11. Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to the bill; but the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, whether the same be an original, or amended, or supplemental bill, without any indorsement requiring such party to appear thereto, and such bill, as against such party, shall pray that such party, upon being served with a copy of the bill, may be

(*g*) 1 Grant's Ch. Pr. ch. 31.
(*h*) Ord. Chan. 112.

CHAP. VI.

bound by all the proceedings in the cause. But this rule shall not prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to the bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit (10 Cons. Ord. r. 11 (*i*)).

Rule 12. Memorandum of service of copy of bill to be entered.

12. Where a plaintiff serves a defendant with a copy of the bill under the 11th rule of this Order, he shall cause a memorandum of such service, and of the time when such service was made, to be entered in the record and writ clerks' office, first obtaining an order of the court for leave to make such entry, which order shall be obtained upon motion without notice, upon the court being satisfied of a copy of the bill having been so served, and of the time when the service was made (10 Cons. Ord. r. 12).

Rule 13. Effect of serving defendant with copy of bill.

13. Where a defendant is served with a copy of the bill, under the 11th rule of this Order, and a memorandum of such service is duly entered, and such defendant does not, within the time limited by the practice of the court for that purpose, enter an appearance in common form, or a special appearance under the 15th rule of this Order; the plaintiff shall be at liberty to proceed in the cause, as if the party served with a copy of the bill were not a party thereto, and the party so served shall be bound by all the proceedings in the cause, in the same manner as if he had appeared to and answered the bill (10 Cons. Ord. r. 13).

Rule 14. Party served with copy of bill may

14. Where a party served with a copy of the bill under the 11th rule of this Order, desires the suit to be pro-

(*i*) This rule may be useful in cases not coming under sect. 42 of 15 & 16 Vict. c. 86 (already mentioned), and when plaintiff does not require an answer, as the proceeding by entering an appearance for defendant and taking the bill *pro confesso* is not absolutely conclusive against a defendant.

secuted against him in the ordinary way, he shall be entitled to have it so prosecuted; and in that case he shall enter an appearance in the common form, and the suit shall then be prosecuted against him in the ordinary way. But the costs occasioned thereby shall be paid by the party so appearing, unless the court shall otherwise direct (10 Cons. Ord. r. 14).

enter common appearance, and have suit prosecuted in ordinary way.

Costs.

15. Where a party served with a copy of the bill under the 11th rule of this Order, desires to be served with a notice of the proceedings in the cause, but not otherwise to have the same prosecuted against himself, he shall be at liberty to enter a special appearance in the following form; (that is to say,) "A. B. appears to the bill for the purpose of being served with notice of all proceedings therein." And thereupon, the party entering such appearance shall be entitled to be served with notice of all proceedings in the cause, and to appear thereon. But the costs occasioned thereby shall be paid by the party entering such appearance, unless the court shall otherwise direct (10 Cons. Ord. r. 15).

Rule 15. Such party may enter special appearance and be served with notice of all proceedings.

Costs.

16. No party shall enter either a common or special appearance under the 14th or 15th rule of this Order, after the expiration of twelve days from the service of the copy of the bill, without first obtaining an order of the court for that purpose; such order to be obtained on notice to the plaintiff, and to be granted, if the court shall think fit, upon such terms as are just. And any party so entering such common or special appearance shall be bound by all the proceedings in the cause prior to such appearance being entered, unless the court shall otherwise direct (10 Cons. Ord. r. 16).

Rule 16. Order for entering common or special appearance.

Party entering same bound by prior proceedings.

17. The service of a copy of a bill upon a defendant, under the 11th rule of this Order, shall be of no validity if not made within twelve weeks from the filing of such bill, unless the court shall give leave for such service to

Rule 17. Time for service of copy of bill.

CHAP. VI.

be made after the expiration of such twelve weeks (10 Cons. Ord. r. 17).

Rule 18. Service out of time of copy of bill.

18. Where the plaintiff omits to serve any defendant with a copy of the bill under the 11th rule of this Order, within twelve weeks from the filing of such bill, the court may, if it shall think fit, upon the motion of the plaintiff, without notice, give the plaintiff leave to serve such defendant with such copy, within such time and upon such terms as to the court shall seem just (10 Cons. Ord. r. 18).

CHAPTER VII.

APPEARANCE—PROCESS TO COMPEL—OF PEERS AND MEMBERS OF PARLIAMENT—OF A FEME COVERT—OF AN INFANT—OF A PERSON OF UNSOUND MIND—AND OF A CORPORATION (*a*).

Peer; served with letter missive.

Member of House of Commons.

If a defendant, being a peer, be served with process, as before stated, and neglect to appear within the time allowed, he must formerly have been served with a subpœna; but, where the defendant was only a member of the House of Commons, a subpœna was issued in the ordinary manner, as in the case of other individuals; but the service of the subpœna in such cases being abolished, the peer must now in default of appearance be served with a printed copy of the bill. If he did not appear after service of the subpœna, the process was and now is alike in both cases, viz. the plaintiff, in the case of a peer, having made affidavit of the above service, in addition to the service of the printed copy of the bill, moves, as of course, for a sequestration *nisi* against the defendant (*b*); upon which a commission of sequestration will issue, directed to certain commissioners therein named, to sequester the defendant's personal estate, and the rents, issues, and profits of his real estates, until he enters his appearance, or the court make any other order to the contrary; unless the defendant, having personal notice thereof shall, within

(*a*) See *ante*, p. 366, as to process to compel appearance being almost obsolete.

(*b*) By order of Parliament no attachment can issue; Hinde, 131.

eight days after such notice, show cause to the contrary. If no cause be shown, the plaintiff is at liberty, at the expiration of the eight days aforesaid, to move to make the order *nisi* absolute. The plaintiff may then, upon motion or petition, obtain an order that the solicitor of the defendant so having privilege of parliament or of peerage may enter an appearance for him; and that all other proceedings may be had, as if the defendant had actually appeared (*c*).

Husband and wife.

If a bill be filed against a husband and wife, and the wife refuse to appear, he will be allowed to enter an appearance for her. And in default of his so doing an attachment may be sued out against him, and if the husband is plaintiff, he may enter an appearance for her in default of its otherwise being done within three weeks, or he may sue out an attachment against her (*d*).

Process in case of an infant or a person of unsound mind.

Rule 3. Default in appearing or answering, by an infant or person *non compos mentis*. Assignment of solicitor as his guardian.

Where, upon default made by a defendant in not appearing to or not answering a bill, it appears to the court that such defendant is an infant or a person of weak or unsound mind not so found by inquisition, so that he is unable of himself to defend the suit, the court may, upon the application of the plaintiff, order that one of the solicitors of the court be assigned guardian of such defendant, by whom he may appear to and answer or may appear to or answer the bill and defend the suit (*e*).

But no such order shall be made, unless it appears to the court on the hearing of such application, that a copy of the bill was duly served in manner provided by the stat. 15 & 16 Vict. c. 86, and that notice of such application was, after the expiration of the time allowed for ap-

(*c*) 1 Will. IV. c. 36, s. 12.

(*d*) Dan. 434, under the above Cons. Ord. 10.

(*e*) The court will not, in the case of a person of unsound mind, appoint the solicitor to the suitors' fee fund such guardian, unless satisfied no relative will undertake the defence; Dan. 434.

*

pearing to or for answering the bill, and at least six clear days* before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such copy of the bill, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian of such infant, unless the court, at the time of hearing such application, shall dispense with such last-mentioned service (7 Cons. Ord. r. 3).

Rule 4. Swearing plea or answer of infant.

Where a plea and answer or a plea or answer severally shall be brought to be sworn by the guardian of an infant, the same shall not be sworn until the order appointing such guardian shall be produced to the person before whom the same shall be sworn (7 Cons. Ord. r. 4).

Rule 5. Service of notice of decree or order, in case of infants or persons of unsound mind.

Where any person required to be served with notice of a decree or order, pursuant to the 8th rule of the 42nd section of the stat. 15 & 16 Vict. c. 86, is an infant or a person of unsound mind not found so by inquisition, the notice shall be served upon such person or persons and in such manner as the judge to whose court the cause is attached may direct (7 Cons. Ord. r. 5).

Rule 6. Guardians *ad litem* for infants or persons of unsound mind.

Guardians *ad litem* appointed for infants or persons of unsound mind not found so by inquisition, who shall be served with notice of any decree or order, shall be appointed in like manner as guardians *ad litem* to answer and defend are appointed in suits on bills filed (7 Cons. Ord. r. 6).

* The six days mentioned in this order must be clear days, Sunday being reckoned one: Brewster *v.* Thorpe, 11 Jur. 6. See also Anderson *v.* Strather, 10 Jur. 383; Biddulph *v.* Lord Camoys, 7 Beav. 580; 10 Jur. 485; Hitch *v.* Wells, 8 Beav. 576; Taylor *v.* Ansley, 9 Jur. 1055; Cookson *v.* Lee, 15 Sim. 302, as to service where there are infants or persons of unsound mind.

CHAP. VII.

Rule 7. Such guardians appointed during proceedings at chambers.

At any time during the proceedings at any judge's chambers under any decree or order, the judge may, if he shall think fit, require a guardian *ad litem* to be appointed for any infant or person of unsound mind not found so by inquisition, who has been served with notice of such decree or order (7 Cons. Ord. r. 7).

Proceedings against a corporate body.

If proceedings be taken against a corporate body, who neglect to appear to the plaintiff's bill, a *distringas* must be issued against them and not an *attachment*. If the defendant do not appear, an *alias distringas*, and then a *pluries distringas*, is issued, on the return of which, if no appearance be entered, a sequestration under orders *nisi* and *absolute*, on an *ex parte* motion by the plaintiff, issues. And where proceedings were instituted to take a bill *pro confesso* against a company (which had been incorporated by Act of Parliament), and also against the directors of the company, notice of motion, served on one of the directors, to enter an appearance for the company, within five days after service, or that the plaintiffs would proceed to take the bill *pro confesso* against the company, was held to be irregular; for although the act made service on a director good service on the company, yet notice ought to have been addressed to the company (*f*).

(*f*) Brickwood *v.* Harvey, 8 Sim. 201.

CHAPTER VIII.

THE DEFENCE—TIME GENERALLY.

A DEFENDANT upon being served with a printed copy of the bill must, as before stated, appear thereto within eight days after such service; but he may appear to a bill of his own accord without being served at all.

A defendant may demur alone to any bill, within *twelve* days after *appearance* (*a*) thereto, but not afterwards (37 Cons. Ord. r. 3).

Rule *4. Time for putting in plea, answer, or demurrer, where defendant required to answer.

A defendant required to answer a bill, whether original or amended, must put in his plea, answer, or demurrer thereto, not demurring alone, within *twenty-eight* days from the delivery to him or his solicitor of a copy of the interrogatories which he is required to answer (37 Cons. Ord. r. *4).

By the 12th section of 15 & 16 Vict. c. 86, it is enacted, that within a time to be limited by a general order of the lord chancellor, the plaintiff in any suit in the court commenced by bill may, if he requires an answer from any defendant, file in the record office interrogatories for the examination of the defendant or defendants, or such of them from whom he shall require an answer, and deliver to the defendant or defendants so required to answer, or his or their solicitor, a copy of such interrogatories, or of

(*a*) This refers to actual appearance, so that a defendant served out of the jurisdiction and appearing after the end of six weeks allowed him to appear and put in his plea, answer or demurrer, not demurring alone, had twelve days further to demur alone. Grüning *v.* Prioleau, 33 Beav. 221.

such of them as shall be applicable to the particular defendant or defendants; and no defendant shall be called upon or required to put in any answer to a bill, unless interrogatories shall have been so filed and a copy thereof delivered to him or his solicitor within the time so limited, or within such further time as the court shall think fit to direct.

By 11 Cons. Ord. r. 1, the interrogatories for the examination of the defendant to a bill may be in a form similar to that set out in Schedule B of the Orders (1st Set. Ord. 15) (*b*).

The time for filing the interrogatories is eight days *after the time limited* for the defendant's appearance (*c*), but not after that time without special leave (11 Cons. Ord. rr. 2 and 3), which may be obtained in chambers.

The service or delivery of a copy of the interrogatories which any defendant is required to answer, is to be made within eight days from the time allowed for his appearance, or, if he fail to appear within the time allowed, at any time afterwards and within eight days after his actual appearance (*d*) (11 Cons. Ord. rr. 4 and 5).

(*b*) If there are several defendants to be interrogated, only one set of interrogatories, including those to be answered by each defendant, is to be *filed*. These rules apply to *amended* bills.

(*c*) Where a defendant voluntarily appears within the time limited, it would seem the interrogatories may be filed immediately thereafter, without waiting for the expiration of the time limited for appearance (Morg. Ch. O. 431). According to Leaman *v.* Brown (7 W. R. 322), the interrogatories may, in pressing cases, be by special leave filed and served with the bill; and according to Braith. Prac. 38, without special leave this may be done in any case.

(*d*) As to filing interrogatories in the case where defendant does not appear, for the purpose of taking the bill *pro confesso* when the defendant absconds, see Baker *v.* Dean, 6 W. R. 719; Butler

Rule *5. Time where defendant not so required.

A defendant not required to answer a bill may, without any leave of the court, put in a plea, answer, or demurrer, not demurring alone, within *fourteen* days after the expiration of the time *within which* he might have been served with interrogatories for his examination in answer to such bill (37 Cons. Ord. r. *5) (*e*).

Rule *6. Time for answer to amendments and exceptions together.

Where a defendant is ordered to answer amendments and *exceptions* together (*f*), he must put in his further answer and his answer to the amendments of the bill within *fourteen* days after he shall have been served with interrogatories for his examination in answer to the amended bill (37 Cons. Ord. r. *6).

Where he does not, and procures no enlargement of the time allowed, he shall be subject to the following liabilities:—

(1.) An attachment may be issued against him; Art. (1.)

(2.) He may be committed to prison, and brought to the bar of the court; Art. (2.)

(3.) The plaintiff may file a traversing note, or proceed to take the bill *pro confesso* against him. Art. (3.)

v. Matthews, 19 Beav. 549; Wilkins *v.* Hogg, 30 L. J., Ch. 492; Ord. 22, r. 2.

(*e*) If defendant appears within the eight days limited, the eight further days after such limited time for serving interrogatories and the fourteen days in this rule make up together thirty days. But there is a difficulty here. If a defendant does not appear there is no ulterior limit of time *within which* interrogatories must be served; he may be served at any time after the eight days limited for appearance; and if he does appear eventually, but long after the time limited, eight days further from such appearance are limited for plaintiff to serve his interrogatories; and so defendant's time for pleading may by defendant's own default in not appearing or delaying his appearance be greatly protracted. *Sed qu.*

(*f*) That is where plaintiff has taken exception to the answer to the interrogatories of the original bill as being insufficient. See Chap. XI., *post.*

CHAP. VIII.

Rule *7. Time for answer to amendments, where no answer required.

Where the plaintiff amends his bill without requiring an answer to the amendments, a defendant who has answered or has not been required to answer the original bill, but desires to answer the amended bill, must put in his answer thereto within *fourteen* days after the expiration of the time within which, if an answer had been required, he might have been served with interrogatories for his examination in answer to such amended bill, or within such further time as the judge may allow (37 Cons. Ord. r. *7) (*g*).

Rule 8. Further time to answer.

8. Where a defendant, using due diligence, is unable to put in his answer to a bill within the times allowed by these Orders, the judge, on sufficient cause being shown, may, as often as he shall deem right, allow to such defendant such further time and on such (if any) terms as to the judge shall seem just (37 Cons. Ord. r. 8) (*h*).

Party in contempt may move to get rid of the contempt.

Although it be generally true, that a party in contempt cannot be heard to make a motion, he is nevertheless permitted to be heard upon a motion to get rid of that contempt; he may also except to a bill for scandal to have it expunged from the record (*i*): also, a plaintiff is entitled to sue out an attachment against a defendant for want of an answer, notwithstanding he is himself in custody for a contempt, in non-payment of costs (*k*).

(*g*) Under the 15 & 16 Vict. c. 86, s. 13, where the appearance has been entered for the defendant, and the bill is afterwards amended, the time to put in a voluntary answer to the amended bill runs from the time of service of the amended bill on him (Morg. Ord. 568, note to this order citing Cheeseborough *v.* Wright, 28 Beav. 173). This order, however, was made under the powers given in the section, after the above case was decided, and fixes the time differently.

(*h*) The application is made in chambers.

(*i*) Everett *v.* Prythergch, 12 Sim. 363.

(*k*) Wilson *v.* Bates, 3 My. & Cr. 197; 9 Sim. 54.

CHAPTER IX.

ANSWER—PROCESS TO ENFORCE—ORDERS 8TH MAY, 1845, AND CONSOLIDATED ORDERS IN TAKING THE BILL PRO CONFESSO.

If the defendant do not file his answer at the expiration of the period allowed him, or obtain further time for that purpose, the plaintiff is at liberty to attach him.

Attachment for want of answer.

An attachment for want of an answer is prepared by the plaintiff's solicitor and taken to the clerk of records and writs, together with an affidavit of the service of the interrogatories, and a *præcipe*, stating the nature of the contempt, must be prepared, and one copy must be entered by the entering clerk and one filed with the clerk of records and writs, and the writ of attachment is then sealed. The writ must be indorsed, stating it to be for not answering. It is directed to the sheriff or other proper officer and must be delivered to him or the under-sheriff, and he must execute it with all speed, and return it upon or before the day named in the writ, stating that he cannot find the defendant (*non est inventus*), or has arrested him and holds him in custody or ready to be produced (as where he has taken bail), or lodged him in gaol (*cepi corpus*). If the sheriff return that he has arrested defendant and taken bail, plaintiff obtains on motion as of course an order that the messenger of the court bring him to the bar of the court. If the messenger cannot find him, the plaintiff may obtain an order for the serjeant-at-arms to arrest him. If the messenger find him in prison, he lodges the order and warrant with the keeper

of the gaol as a detainer, and returns accordingly, and the plaintiff must resort to a *habeas corpus*. If the sheriff arrests defendant and lodges him in gaol or keeps him in prison, being already there, he is brought to the bar of the court by a *habeas corpus*. When the defendant is in any of these ways brought to the bar of the court, the plaintiff's counsel moves that he may be turned over to the Queen's Prison, to remain there until he shall fully answer the plaintiff's bill, clear his contempt, or the court make an order to the contrary.

After the defendant is in this manner lodged in prison, the plaintiff's next step, on the gaoler's certificate, is to move that a *habeas corpus cum causis* be directed to the keeper of the Queen's Prison, commanding him at the return thereof to bring the defendant to the bar of the court that he may clear his contempt; and that the clerk of the records and writs may at the same time attend with the record of the bill, in order that it may be taken *pro confesso* against the defendant.

Rule 1. Attachment for want of answer.

Where there is just reason to believe that any defendant means to abscond before answering the bill, the court may, on the *ex parte* application of the plaintiff, at any time after an appearance has been entered for him by the plaintiff, order an attachment for want of answer to issue against him; and such attachment shall be made returnable at such time as the court shall direct (12 Cons. Ord. r. 1).

Effect of Ord. 73, May, 1845.

The 73rd Order, 8th May, 1845, directs that, if any defendant, being in custody of the serjeant-at-arms, or of a messenger, under an attachment for want of his answer, be not brought to the bar of the court within ten days after he was taken into custody, he must be discharged out of custody by the officer in whose custody he is, with costs, to be paid by the plaintiff; but the defendant is liable to be attached afresh, unless he put in his answer

within eight days after his discharge: and, if any defendant be put in prison under, or being already in prison, be detained under, an attachment for not answering, and be not brought to the bar of the court within thirty days from his being in custody or detainer (being already in custody under such attachment), he must, in like manner, be discharged; but, to avoid a new attachment, he must put in his answer within eight days after such discharge (12 Cons. Ord. rr. 2 & 3).

Defendant in a foreclosure suit, although in contempt, ought to be served with a summons.

But where the defendant has appeared to the plaintiff's bill, and proceedings are had under a decree taking the bill *pro confesso*, for want of an answer in a foreclosure suit, the defendant, notwithstanding he be in contempt, ought to be regularly served with a summons to attend the judge's chief clerk. The court punishes the defendant's default in refusing to answer, by giving to the plaintiff the benefit of a decree upon the bill as confessed; but there the advantage stops: and when the decree is once pronounced, the subsequent duty of the court and its officers is to execute that decree in the ordinary way; therefore an order absolute, in the first instance, to obtain the chief clerk's certificate, made under a decree taken *pro confesso* for want of an answer, is irregular (*a*).

Rule 4. Pauper defendant in custody for want of his answer.

Where a defendant is brought up in custody for want of his answer, and makes oath in court that he is unable by reason of poverty to employ a solicitor to put in his answer, the court, if not satisfied with the truth of that allegation, may direct an inquiry as to the truth thereof, and may appoint a solicitor to conduct such inquiry on the behalf of the defendant; and if it is ascertained by means of such inquiry, or if the court is satisfied without such inquiry, that such defendant is unable by reason of poverty to employ a solicitor to put in his

Assignment of a solicitor and counsel.

(*a*) King *v.* Bryant, 3 My. & Cr. 191.

answer, the court may assign a solicitor and counsel for such defendant to enable him to put in his answer (12 Cons. Ord. r. 4).

Rule 6. Pauper prisoners in contempt.

Where application is intended to be made for the discharge of any prisoner in contempt, and for the payment out of the Suitors' Fund of the cost of such contempt, in pursuance of the provisions for that purpose contained in the statute 1 Will. IV. c. 36, notice in writing of such intended application shall be served upon the solicitor to the Suitors' Fund, two clear days at the least before the day upon which the application is intended to be made. And where an order is made under the said Act, or under the 4th Rule of this Order, directing an inquiry as to the fact of the poverty of any prisoner in contempt, notice in writing of such order, and of every summons to proceed thereupon, shall be duly served upon the solicitor to the Suitors' Fund (12 Cons. Ord. r. 5). If the plaintiff is determined upon having an answer, he must obtain an order upon motion that the defendant may remain in custody until he has answered the bill. This order will be no prejudice to the plaintiff's right to take the bill *pro confesso*, but notice of motion must be served on the defendant.

Rule 6. Sequestration on return *non est inventus* to attachment for want of answer.

Upon the sheriff's return *non est inventus*, to an attachment issued against any defendant for not answering the bill, and upon affidavit made that due diligence was used to ascertain where such defendant was at the time of issuing such writ, and in endeavouring to apprehend such defendant under the same, and that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued, the plaintiff shall be entitled to a writ of sequestration (12 Cons. Ord. r. 6), or he may move that the serjeant-at-arms apprehend defendant. Thereafter he may proceed to take the bill *pro confesso*.

He may, however, proceed to the actual execution of the process to compel an answer, but this is rarely necessary or proper. Instead of asking for a sequestration or the action of the serjeant-at-arms, plaintiff may at once proceed as against an absconding defendant, under Gen. Ord. 22, to take the bill *pro confesso*.

Rule 7. Resuming former process of contempt, in case where answer is insufficient.

Where a defendant, in contempt for want of answer, obtains, upon filing his answer, the common order to be discharged as to his contempt, on payment or tender of the costs thereof, or the plaintiff accepts the costs without order, the plaintiff shall not be compelled, in case the answer is insufficient, to recommence the process of contempt against the defendant, but shall be at liberty to take up the process at the point to which he had before proceeded (12 Cons. Ord. r. 7).

To compel answer of a member of Parliament.

When the plaintiff seeks to compel an answer from a person having privilege of Parliament, he must proceed to obtain orders for a sequestration *nisi* and *absolute*, in the same manner as is adopted to compel his appearance to the plaintiff's bill; observing, however, that in addition to the affidavit of service and no cause being shown against making the order *nisi* for the sequestration absolute, the plaintiff must produce the certificate of the clerk of records and writs of the answer not having been filed: on the order *nisi* being made *absolute* the plaintiff proceeds, as in other cases, to take the bill *pro confesso* against the defendant. Or the plaintiff may himself file a *traversing note*, which has the same effect as an answer filed by the defendant denying all the statements contained in the bill (13 Cons. Ord. r. 6).

The same proceedings are also had to compel the several answers of a married woman, an infant, a person of unsound mind, and a corporation, as were before the Orders of 26th August, 1841, used to enforce their appearance.

CHAP. IX.

In the case of an infant, or a person of unsound mind not found so by inquisition, the court will, upon motion, order one of the solicitors of the court to answer for them as guardian, and so defend their suit.

Defendant bound to clear his contempt before further step.

The defendant must clear his contempt before he can take any effectual proceedings in the cause; and if he be in custody for want of an answer, he cannot, unless at the plaintiff's option, be liberated therefrom before he has filed his answer, paid or tendered the costs of his contempt, and obtained an order for his discharge. The costs incurred by the process of contempt against the defendant for want of an answer, will not be allowed in taxing the costs of suit as between party and party. The plaintiff ought not therefore to release the defendant from custody before they are paid (*b*).

If the defendant put in an insufficient answer to the plaintiff's bill, the latter may, notwithstanding, take the bill *pro confesso*, for an insufficient answer is reckoned as no answer (*c*).

Plaintiff, by amending his bill, waives contempt.

The plaintiff however, by amending his bill, waives his process of contempt (*d*); but he will be allowed upon application to the court upon motion or petition, and giving personal notice to defendant, to amend his bill, without its operating as a discharge of such contempt, or to commence *de novo* where the defendant upon being brought to the bar of the court for his contempt refuses to put in his answer (*e*).

When the defendant puts in his answer without dis-

(*b*) Attorney-General *v.* Carrington, 6 Beav. 454.

(*c*) Joplins *v.* Stuart, 4 Ves. 619.

(*d*) Gray *v.* Campbell, 1 R. & M. 323; Gompertz *v.* Best, 1 Will. IV. c. 36, r. 10; Landers *v.* Allen, 6 Sim. 619; Oldfield *v.* Cobbett, 1 Phill. 557; Haynes *v.* Ball, 5 Beav. 140.

(*e*) 11 Geo. IV. & 1 Will. IV. c. 36, s. 15, r. 10.

charging the costs of his contempt, and plaintiff files his replication or takes any subsequent step in the cause, he thereby waives the process of contempt.

The usual course of the plaintiff now in the event of defendant failing to answer is to proceed under Cons. Ord. 22 to have the bill taken *pro confesso;* and the above processes of contempt are rarely required.

Where an *attachment has been executed* against any defendant for want of an answer there is but little difficulty, for by the 22nd Ord. r. 1, thereupon or at any time within three weeks afterwards, plaintiff may cause the defendant to be served with a notice of motion, to be made on some day not less than three weeks after the day of such service, that the bill may be taken *pro confesso* against such defendant; and unless the defendant has in the meantime put in his answer to the bill or obtained further time, the court may order the bill to be taken *pro confesso* against him either immediately or upon such terms as, under the circumstances, the court shall think proper.

If the writ cannot be executed, the plaintiff, instead of proceeding to obtain a sequestration under the Ord. 12, r. 6, may avail himself of the 2nd rule of the above Order 22. "Where any defendant, whether within or not within the jurisdiction of the court, does not put in his answer in due time after appearance entered by or for him, and the plaintiff *cannot with due diligence procure a writ of attachment* or any subsequent process for want of an answer *to be executed* against such defendant by reason of his being out of the jurisdiction, or being concealed, or for any other cause, then such defendant shall, for the purpose of enabling the plaintiff to obtain an order to take the bill *pro confesso*, be deemed to have

absconded to avoid or to have refused to obey the process of the court (*f*).

Proceedings to take the bill *pro confesso*, accordingly as defendant appears or not, must then be taken under the following rules. Under r. 3 of the same Order 22, it is provided, that where any defendant may be deemed to have absconded to avoid or to have refused to obey the process of the court by *appearing in person or by his own solicitor*, the plaintiff may *serve upon him* or his solicitor a *notice* that, on a day in such notice named (being not less than fourteen days after service of such notice), the court will be moved that the bill may be taken *pro confesso* against the defendant, and the plaintiff must, upon the hearing of such motion, satisfy the court that such defendant ought, under the provisions of the 2nd rule of the above order, be deemed to have absconded to avoid or to have refused to obey the process of the court; and the court if so satisfied and if an answer has not been filed may, if it so think fit, order the bill to be taken *pro confesso* against such defendant, either immediately or upon such further notice as under the circumstances of the case the court may think proper. If he has not appeared, and an appearance has been entered for him, and an attachment obtained against him as an absconding defendant, the difficulty as to serving him personally with notice, as in the last rule, is met by rule 4,—*i. e.* Where any defendant under rule 2 may be deemed to have absconded to avoid, or to have refused to obey the process of the court, *has had an appearance entered for him* under the 4th, 6th or 7th rule of Order 10, and *does not afterwards appear* in person or by his own solicitor, the plaintiff

(*f*) Interrogatories must have been filed, but it is not absolutely necessary that they be served or advertised, or that an attachment should have actually issued (Morg. Ord. 476).

may cause to be inserted in the "*London Gazette*" a notice that, on a day named (being not less than four weeks after the first insertion of such notice in the "London Gazette"), the court will be moved that the bill may be taken *pro confesso* against such defendant, and the plaintiff must, upon the hearing of such motion, satisfy the court that such defendant ought, under the provisions of the 2nd rule of this order (Ord. 22), be deemed to have absconded to avoid, or to have refused to obey the process of the court, and that such notice of motion has been inserted in the "London Gazette" at least once in every entire week (reckoning from Sunday morning to Saturday evening), which shall have elapsed between the first insertion thereof and the time for which the said notice is given; and the court, if so satisfied and if an answer has not been filed, may, if it so think fit, order the bill to be taken *pro confesso* against such defendant, either immediately or at such time or upon such further notice as, under the circumstances of the case, the court may think proper.

By rule 5, any defendant being in custody for want of his answer, and submitting to have the bill taken *pro confesso* against him, may apply to the court upon motion with notice, to be served on the plaintiff, to be discharged out of custody; and thereupon the court may order the bill to be taken *pro confesso* against such defendant, and may order him to be discharged out of custody, upon such terms as seem to be just, unless it appears, from the nature of the plaintiff's case or otherwise to the satisfaction of the court, that justice cannot be done to the plaintiff without discovery or further discovery from such defendant.

A defendant, against whom an order to take the bill *pro confesso* is made, may appear at the hearing; and where he waives all objection to the order, but not other-

wise, he may be heard to argue the case upon the merits as stated in the bill (22 Cons. Ord. r. 7); and upon the hearing, such decree shall be made as to the court shall seem just. And where the defendant has appeared at the hearing and waived all objection to such order to take the bill *pro confesso*, the decree shall be made absolute (r. 8). In pronouncing the decree the court may, either upon the case stated in the bill or upon that case and a petition presented by the plaintiff, order a receiver of the real and personal estate, or direct a sequestration to issue and direct payment to be made to the plaintiff out of such real or personal estate as he shall appear entitled to (r. 9). But, for the above purpose, leave of the court must be obtained on motion, with notice served on the defendant or his solicitor, unless the court shall dispense with such service (r. 13).

After a decree founded on a bill taken *pro confesso* has been passed and entered, an office copy thereof (unless the court shall dispense with the same) shall be served on the defendant against whom the order to take the bill *pro confesso* was made, or his solicitor; and where the decree is not absolute under the 8th rule of Ord. 22, the defendant or his solicitor shall be at the same time served with a notice, to the effect that if such defendant desires permission to answer the plaintiff's bill and set aside the decree, application for that purpose must be made to the court within the time specified in the notice, or that otherwise he will be absolutely excluded from making any such application (r. 11). The time for such application where the defendant is within the jurisdiction is three weeks after service of the above notice; but where such notice is to be served out of the jurisdiction of the court, the time shall be specially appointed by the court on the *ex parte* application of the plaintiff (r. 12).

Should the defendant waive all objection to the order

to take the bill *pro confesso*, and submit to pay all such costs as the court might direct, he may, before inrolment of the decree, have the cause reheard upon the merits stated in the bill; the petition for rehearing being signed by counsel as other petitions for rehearing (r. 14).

CHAPTER X.

OF THE VARIOUS MODES OF DEFENCE TO A BILL.

Various modes of defence.

THERE are four modes which the defendant, after he has entered his appearance, may adopt for the purpose of defending himself against the claims which are set forth in the plaintiff's bill:—1, by demurrer; 2, by plea; 3, by answer; 4, by disclaimer.

1. OF THE DEMURRER.

Demurrer, where error apparent.

1. A demurrer is a mode of defence where any *apparent* objection arises to the plaintiff's bill itself, either from matter contained in it, or from defect in its frame, or in the case made out by it, and thereupon demands the judgment of the court, whether the defendant shall be compelled to answer the plaintiff's bill or not. A demurrer* is that which, admitting (*a*) the facts as alleged in the plaintiff's bill to be true, denies the right of the plaintiff upon those facts, as therein set forth, to a decree or to call upon the defendant to answer. And it has been held, that upon a demurrer the allegations of the bill will be read most strongly against the plaintiff. Thus if a plaintiff make two statements in his bill which are inconsistent with each other, the defendant is at liberty, for the purposes of a demurrer, to assume that

* From *demorari*, or *demeurer*, to rest or abide the question.—*Vide* 3 Blackstone, c. 21.

(*a*) That is, for the purposes of the demurrer—for the sake of agreement, as may be said—but not waiving the right to challenge the allegations if the demurrer should be overruled.

to be true which will be most against the plaintiff's case: therefore, where a settlement is set forth in such a manner in one part of the bill as to show that the plaintiff's father then living was tenant for life, and with remainder to the plaintiff as tenant in tail, and in another part of the bill the father is described as tenant in tail, and the plaintiff as *issue in tail*, the defendant was entitled, on demurrer, to adopt this latter allegation to be true, and therefore that the plaintiff, by his own showing, had no right to institute the suit (*b*). The demurrer is merely to matters of fact contained in the bill, or upon the omission of matters which ought to be therein, or attendant thereon, and not upon any foreign matter alleged by the defendant (*c*). The demurrer confesses only matters of fact, and not matters of law (*d*). The principal object of a demurrer is to avoid a discovery which may prejudice the defendant, to cover a defective title, or to prevent the unnecessary expense and delay which might be occasioned by a full investigation of the facts of the case and the accounts and inquiries consequent upon a decree, when upon the facts as alleged the plaintiff has no case.

The demurrer is only allowed where it is clear that upon a full investigation the plaintiff can be entitled to no equity; in other cases the court will not summarily dismiss a bill upon demurrer.

All the above modes of defence, *i. e.*, the demurrer, plea, answer and disclaimer, may be joined, provided each relates to a separate and distinct part of the bill; and a defendant may put in several demurrers to separate and distinct parts of a bill, for separate and distinct causes; but a defendant could not formerly have de-

All the defences may be joined.

(*b*) Vernon *v.* Vernon, 2 My. & Cr. 145. See also *ante*, 284.

(*c*) Mitf. 108.

(*d*) 2 Ves. & B. 95; 3 Meriv. 503; Cuthbert *v.* Creasy, 6 Madd. 189.

CHAP. X.

murred and pleaded (*e*), or demurred and answered, to the *same matter*, for the answer would have overruled the demurrer (*f*). In like manner also, if the defendant had pleaded to any part of a bill before demurred to, the plea would have overruled the demurrer (*g*).

37 Order, 26th August, 1841.

But no demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea (14 Cons. Ord. r. 9), or only because such demurrer or plea does not cover so much of the bill as it might by law have extended to (r. 8) (*h*).

Demurrers to original bills, which comprehend the various defences made to all other species of bills, are considered under two heads,—first, demurrers to *relief* (which sometimes include a demurrer to discovery), and secondly, demurrers to *discovery* only (*i*).

Ground of demurrer to the relief.

The principal grounds of demurrer to the *relief* sought by an original bill, are—

1. That the subject of the suit is not within the jurisdiction of a court of equity. The principal heads of equity jurisdiction have already been treated of and need not here be further referred to.

2. That some other court of equity has the proper jurisdiction. The principal of the inferior jurisdictions in England were those of the counties palatine of Chester,

(*e*) Domer *v.* Fortescue, 2 Atk. 283.

(*f*) Jones *v.* Earl of Strafford, 3 P. Wms. 80.

(*g*) Mitf. 209.

(*h*) These orders, however, only relate to *accidental* overlappings of the demurrer or plea and the answer, where, from the manner in which the allegations of the bill are framed, it is difficult to separate the parts to which the demurrer or plea and answer respectively apply as defences, and not to warrant the defendant in purposely joining two defences to the same matter.

(*i*) Mitf. 109.

Lancaster and Durham,* the courts of the two Universities of Oxford and Cambridge, of the city of London, and of the Cinque Ports; which are limited by their locality either in respect to the subject of the suit, or the residence of the litigant parties, but have exclusive jurisdiction within such locality. When, therefore, it is apparent on the face of a bill, that any of these courts has the proper jurisdiction, the defendant may demur.

3. When it appears upon the face of the bill that the plaintiff is not entitled to sue by reason of some personal disability, as where an infant, or a married woman, or an idiot exhibiting a bill, appear to be thus incapable of instituting proceedings alone, and no next friend or committee is named in the bill,—the reason why a defendant may demur to such a bill is, that he might be materially injured by being compelled to answer a bill exhibited by persons whose property is not at their own disposal, and who are incapable of paying costs (*k*).

4. That the plaintiff has no interest in the subject, or a proper title to institute a suit concerning it; as where an executor does not appear by his bill to have proved the will of the testator, or appears to have proved it in an improper court, or where a plaintiff claimed under a will when it was discovered upon the construction of the will that he had no title: and a want of interest in the subject of the suit is a good ground of demurrer, not only to a bill for relief, but also to a bill seeking discovery merely.

* The 1 Will. IV. c. 70, abolished the exclusive jurisdiction of the county palatine of Chester, which is now merged in that of the courts of Westminster. And by the 6 & 7 Will. IV. c. 19, the palatine jurisdiction of the county palatine of Durham, and all its legal rights, were severed from the bishopric of Durham, and vested in the crown.

(*k*) Mitf. 154.

5. That the plaintiff has no right to call on the defendant concerning the subject of the suit, notwithstanding he may have an interest in the suit, and a right to institute a suit concerning it. Thus, although an unsatisfied legatee has an interest in the testator's property, and a right to have it applied to satisfy his demands in a due course of administration, yet he cannot file his bill calling upon the debtors to his testator's estate to pay their debts in satisfaction of his legacy; and this is by reason of the want of privity between the legatees and debtors, the latter being accountable only to the representative of the testator (*l*).*

Neither can creditors file a bill against a trustee appointed by a person for the payment of his debts; for in such a case the character of trustee and *cestui que trust* never existed between the creditors and the trustees of the title-deeds, the settlor himself being the only *cestui que trust.*

"A man who, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts; his object is not to benefit his creditors" (*m*).

6. That the defendant has not that interest in the suit which can render him liable to the claims of the plaintiff; as where a bankrupt is made a defendant to a bill, which is filed against his assignees: for, by the act of bankruptcy, all the interest which the bankrupt was possessed

(*l*) Mitf. 158.

* But see 1 R. & My. 281, *n.*, and Pearse *v.* Hewitt, 7 Sim. 471, as to joining executors and debtors in a suit by legatees. See also Barker *v.* Birch, 10 Law Times, 66, and the cases there cited.

(*m*) Per M. R., in Bill *v.* Cureton, 2 My. & K. 511, in allusion to Wallwyn *v.* Coutts, 3 Mer. 707, and Gerrard *v.* Lord Lauderdale, 3 Sim. 1. *Vide* 2 Keen, 134.

of, or entitled to, passes from him to his assignees, and therefore, in respect of the *relief* applied for by the bill, he may demur, although if any *discovery* be sought of his actions prior to his becoming a bankrupt, he may be compelled to answer to that part of the bill for the sake of the discovery. And so where a person having had an interest in the subject of the suit has assigned that interest, he may yet be compelled to answer with respect to his own acts before the assignment.

From these few instances, which have been adduced to show in what cases a demurrer will lie, we perceive that, in order to prevent a party from demurring, the bill must, in general, not only show that the defendant has an interest in the subject, but that he is also liable to the plaintiff's demands.

7. That for some reason, founded on the substance of the bill, the plaintiff is not entitled to the relief he prays: as where, in a bill to perpetuate the testimony of witnesses, it is not stated that no action can be immediately brought (*n*).

8. That the bill is insufficient to answer the ends of complete justice; for as it is the object of a court of equity to do complete justice between the parties interested in the subject of the suit, and to make the performance of the order of the court safe to those who are compelled to obey it, and prevent future litigation (*o*), a demurrer will be allowed to a bill where all persons materially interested in the suit are not made parties thereto, how numerous soever they may be: but the court will, in some cases, depart from this general rule, where there exists a difficulty in bringing all the parties interested before the court, and all the persons who are in the same interest, and answering that description, cannot

(*n*) Angell *v.* Angell, 1 S. & S. 83.
(*o*) Mitf. 164.

be easily ascertained. For this reason a few creditors may file a bill on behalf of themselves and all the other creditors of their deceased debtor, for an account and application of his assets in the payment of their demands (*p*).

The defendants, in demurring for want of parties, must show who are the proper parties, to enable the plaintiff to amend, by adding the proper parties to the record. A bill may also be demurred to where the signature of counsel has been omitted.

9. That the bill improperly confounds distinct subjects, or unnecessarily multiplies suits; therefore, as, on the one hand, a plaintiff will not be allowed by one bill to demand several matters of various natures against each defendant, tending to burden him with an accumulation of pleadings, referring merely to the several claims of the other defendants, without any connection with his own; so, on the other hand, the court will prevent the splitting of causes and the multiplicity of suits consequent thereon (*q*), and, in either case, will entertain a demurrer. And where there are several defendants it may happen that a bill which is multifarious as to one of the defendants is not so as to the rest; thus, in Attorney-General *v.* Craddock (*r*), one of the defendants demurred to the information for multifariousness, and the demurrer was allowed—the other defendants having pleaded the allowance of that demurrer, the plea was overruled. But where the defendants are all in the same interest, as the assignees of a bankrupt, the case against all of them being the same, a demurrer having been allowed as to one

(*p*) And see further, *ante*, Chap. III. p. 308, as to the present practice in dispensing with the rule requiring all persons interested to be parties in a large number of cases.

(*q*) Mitf. 183; Dunn *v.* Dunn, 2 Sim. 329.

(*r*) 8 Sim. 467.

of them was held sufficient to bar the plaintiff's demand as to the rest of the defendants (*s*).

The distinction between multifariousness and misjoinder has been usually understood as follows:—namely, that the former consists in mixing up several matters in one bill, which ought to be made the subject of distinct suits; and the latter—*i. e.* misjoinder—is where persons are improperly introduced as parties to the record: but this definition will not exactly meet the dicta of the learned judges upon the subject. Indeed, it will be seen, by reference to this part of pleading, that where a suit is multifarious it necessarily involves a misjoinder either of plaintiff or defendant. On the other hand, there may exist a misjoinder of parties, without multifariousness; where, for instance, a defendant properly objects that he ought not to be made a party to the record, this objection does not necessarily imply that the bill is multifarious.

The lord chancellor (Cottenham), in Campbell *v.* Mackay (*t*), confesses that, "to lay down any rule applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is upon the authorities utterly impossible."

In reference to *misjoinder*, this learned judge, in the same case, says it is where "the cases or claims recited in the bill are of so different a character that the court will not permit them to be litigated in one record." And that "what is more familiarly understood by the term *multifariousness*, as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever."

And, in Brookes *v.* Whitworth (*u*), it was held that a

(*s*) Tarleton *v.* Hornby, 1 You. & Col. 333.
(*t*) 1 My. & Cr. 619. (*u*) 1 Madd. 86.

CHAP. X.

defendant has a right to insist that he is not bound to answer a bill, containing several distinct and separate matters, relating to individuals with whom he has no concern.

Thus it appears, from the above description given by Lord Cottenham, that the term misjoinder is equally applicable to the improper introduction of *distinct matters*, as well as parties to the record.

Where there are several parties, although unconnected, they may be joined in a suit, provided they have among themselves one common interest centring in the point in issue in the cause (*x*). Thus, where plaintiff claimed one general and entire right, viz., a sole fishery against several persons claiming adverse rights in the fishery by different titles, a bill to restrain infringement lay against all.

And it does not follow that where there are several matters inserted in the bill, although of a distinct nature, an objection on that account will prevail; if, for example, there exists some connecting link, rendering a combination of them convenient to be settled by means of one and the same suit, the court will prefer determining the claims of all the parties by the same decree to the allowing of separate proceedings (*y*).

Ground of demurrer to discovery.

All the grounds of demurrer to the relief are bars to the discovery incidental to such relief; but the plaintiff may, in some cases, be entitled to relief, but not to some of the discovery sought, or he may only seek discovery.

The principal grounds of objection, by way of demurrer to the *discovery* only, are now to be considered, which are the following:—

1. That the case made by the plaintiff is not such as that a court of equity will exercise a jurisdiction to compel

(*x*) Ward *v.* Duke of Northumberland, 2 Anstr. 469.
(*y*) Calv., 2nd edit. 96.

a discovery; for instance, where the discovery is sought to aid the prosecution or defence, or any other process, not merely civil, in any other court, as an indictment or information.

2. That the plaintiff has no interest in the subject which will entitle him to call upon the defendant for a discovery; as where the plaintiff seeks for a discovery in support of an action at common law, and the case stated by his bill is not such a one as will support an action: for, supposing his case to be true, unless he can show a title to recover in the action at law, he has no right to the aid of a court of equity to call upon the defendant to disclose evidence of the truth of the case.

3. That the defendant has not such interest in the subject of the suit as will justify the plaintiff in instituting proceedings against him; as where he is merely a witness, claiming no benefit whatever under the suit, or where the bill is filed against a *feme covert* and her husband in aid of an action of debt on her account (*z*). But if the bill state that defendant has or claims an interest, he can only avoid answering the bill by plea that he has no interest, or disclaimer of any interest he had claimed or has.

4. That there is no privity between the plaintiff and defendant, although they may both claim an interest in the subject of the suit.

5. That the discovery, if obtained, would be immaterial to the relief prayed by the bill, or the suit or action in aid of which it is asked.

6. That the situation of the defendant is such as renders it improper for a court of equity to compel a discovery; as where the bill charges the defendant with an act which would subject him to a criminal prosecution

(*z*) Barron *v.* Grillard, 3 Ves. & B. 165.

CHAP. X.

under a statute, or to any particular penalties, unless it should happen that the plaintiff is alone entitled to the penalty, and waives it by express words in the bill. In such a case he may enforce a discovery from the defendant; for the discovery cannot any longer subject him to a penalty (*a*): or when the discovery would subject the defendant to some forfeiture, or hazard his title in a case, where, in conscience, he has at least an equal right with the party demanding the discovery.

It may be here remarked that a demurrer to a bill for a discovery only will not hold for want of parties (*b*).

A defendant, although he may think proper to give the discovery, is still entitled to demur to the relief (*c*): but, as a rule, he cannot demur only to the discovery incidental to the relief prayed, unless he demur to the relief; for then he does not demur to the thing required, but the means by which it is sought to be obtained (*d*). The special grounds (mentioned in 5 and 6 above) to discovery only may be so used.

A demurrer need not be entered with the registrar, but when once it is filed, it may be set down for argument immediately by either the plaintiff or defendant (14 Cons. Ord. r. 11).

The demurrer is heard by the judge to whose court the cause has been attached, unless otherwise ordered by the Lord Chancellor.

Speaking demurrer, what.

When any new matter is introduced, which is essential to the support of the demurrer, it is called a *speaking* demurrer, and will be overruled; but the mere introduction of argument is considered as nothing more than surplusage, and does not render the demurrer a speaking demurrer (*vide* also 14 Cons. Ord. r. 1).

(*a*) Mitf. 195. (*b*) Ibid. 200.
(*c*) 2 Atk. 157; Todd *v.* Gee, 17 Ves. 273.
(*d*) 2 Bro. C. C. 126.

Demurrer drawn and signed by counsel.

The demurrer is drawn and signed by counsel. It neither requires to be signed by the defendant nor to be put in upon oath; because the demurrer, being an admission of the truth of the facts alleged in the bill, submits to the court whether the defendant is bound to answer such allegations as are therein set forth.

No demurrer after order for time.

A defendant cannot demur after obtaining an order for time, otherwise it will be taken off the file with costs; neither can it be filed after an attachment has issued against a defendant for want of an answer; but the defendant is at liberty, after obtaining an order for time, to put in his demurrer and answer.

Demurrer allowed usually ends the suit.

A demurrer which goes to the whole bill, and, upon argument or otherwise, is allowed, puts an end to the suit, although the court will give the plaintiff leave to amend the bill upon payment of costs (*e*). But, although, strictly speaking, when a demurrer to the whole bill is allowed, the bill is out of court, and the plaintiff must begin *de novo*,—yet there have been instances where, after the bill has been dismissed by order, the cause has been set on foot again at the discretion of the court (*f*).

After a demurrer is overruled, if the defendant wishes to plead, answer or demur, he must apply specially for time when the demurrer is disposed of (*g*).

On the argument of the demurrer the court will take into consideration the nature of the case, in order that it may consider not only as to whether there ought to be any direction given as to the costs, but as to whether leave ought to be given to amend the bill. It being

(*e*) For this reason, there is generally little use in demurring if the defect be remediable: but it may be sometimes advisable even in such case to demur, in order to force plaintiff to state his case fully and unambiguously and bind himself thereto.

(*f*) Baker *v.* Millish, 11 Ves. 72.

(*g*) 1 Sim. & Stu. 469.

CHAP. X.

entirely in the discretion of the court to direct either upon the facts appearing before it (*h*). See 14 Cons. Ord. r. 12.

The 45th Order of 8th May, 1845, directs that, where a demurrer to the whole or part of a bill is allowed upon argument, the plaintiff, unless the court order to the contrary, is to pay to the demurring party the costs of the demurrer; and if the demurrer be to the whole bill, the costs of the suit also (14 Cons. Ord. r. 13).

Under the 16th art. of Order XVI., a defendant may demur alone to any bill within twelve days after his appearance thereto, but not afterwards.

When demurrer held sufficient.

When the demurrer to the whole bill is not set down for argument within twelve days after the filing thereof, and the plaintiff does not within that time serve an order for leave to amend the bill, the demurrer is to be held sufficient, to the same extent, and for the same purposes, and the plaintiff is to pay to the demurring party the same costs as in the case of a demurrer to the whole bill allowed upon argument. Where a demurrer to part of a bill is not set down for argument within three weeks after the filing thereof, and the plaintiff does not within the three weeks serve an order for leave to amend the bill, the demurrer is to be held sufficient, to the same extent, and for the same purposes, and the plaintiff is to pay to the demurring party the same costs as in the case of a demurrer to part of a bill allowed upon argument (14 Cons. Ord. rr. 14 and 15).

When a demurrer is overruled, the defendant may raise the same point again in his answer; and sometimes the court expressly overrules the demurrer without prejudice to the defendant's so raising the point again—the effect of which is to give the court's sanction and obviate

(*h*) Schneider *v.* Lizardi, 9 Beav. 461; 15 Law Jour. 235.

any objection on the ground of vexatiousness. By leave of the court, also, the defendant may state the necessary facts more fully or clearly, and raise the same point in a plea. After the demurrer overruled, the defendant must put in an answer in the regular time, unless by leave he can put in a plea, or can obtain an extension of time.

The separate causes of demurrer, if stated, must be clearly urged as separate and distinct causes of demurrer, and if any one is held good the demurrer is allowed; but defendant may at the hearing assign other causes of demurrer *ore tenus* (*i*).

Demurrers may be put in to different and distinct parts of the bill, such parts being distinctly pointed out. And a demurrer may be urged to part only of the bill, distinctly pointed out, the rest being met by plea or answer, or both. There is often, however, great difficulty in framing such a defence, and if the defendant only objects to part of the discovery, facility for raising such objection by answer is now given by Ord. 15, r. 4—which, in some measure, qualifies the old rule, that if a defendant answers he must answer fully. And the difficulty as to framing such a partial demurrer is also somewhat removed by the Ord. 14, rr. 8 and 9, under which a demurrer or plea is not to be overruled simply because by accident it does not object to some discovery which might have been barred by it, or because the answer gives accidentally some discovery which the demurrer or plea does or affects to bar.

The demurrer which, forming a good defence to part of the bill or discovery, is pleaded to more, and fails to cover or bar more, will be overruled altogether. (But see the rules above mentioned.)

Demurrers are not generally favoured; and it has been

(*i*) But see as to costs, Dan. 549.

CHAP. X.

held that the court will not decide a doubtful question on demurrer—at least where a full investigation and discovery of the whole facts might possibly turn the scale, but the defendant must put in an answer.

If it is a clear short point, however, which can properly be settled on demurrer, it should be put in on peril of costs.

II. OF THE PLEA.

Plea used when objections are not apparent on the bill.

We have seen that a demurrer is a mode of defence when any objection is apparent on the face of the bill itself; but, when the objection to a bill is not thus apparent, and the defendant means to take advantage of it, he must do so by a *plea*, or by answer. The demurrer charges that, upon the facts as stated by the plaintiff, there is no equity. The plea states some facts in the case which the bill does not reveal, to show that in reality there is no equity. Various facts cannot be pleaded in one plea unless they all tend to reduce the cause to a single point of defence, as where there are several deeds which all conduce to establish the single point of title (*k*). A plea is sometimes denominated a special answer, which, so far as it applies, creates a bar to the suit. It has been said that the object of a plea is to reduce the cause, so far as it is covered by the plea, to a simple point, in order to save expense to the parties; therefore, where the defence consists of a variety of circumstances, a different mode of defence must be used, as the examination must still be at large (*l*). That which is called a double plea

(*k*) 2 Ves. & B. 153; Ashurst *v.* Eyres, 3 Atk. 341; Ritchie *v.* Aylwin, 15 Ves. 82.

(*l*) Mitf. 219. In fact, where the plea does in reality raise issues upon a large part of the facts of the case, it is only just to plaintiff that he should have full discovery by answer, so as to set the whole case fairly before the court.

is informal and improper: for, if a defendant were allowed to offer two matters of defence, he would, by the same reason, be justified in making any number of defences, whereby the object of the plea would be frustrated, and all the inconvenience and delay would be introduced, which it was the main design of pleading to obviate; and the court would be called upon to give a summary decision on a variety of defences before proof thereof could be given (*m*); although, under special circumstances, the court would give leave to the defendant to plead doubly (*n*).

Pleas are of three kinds—I. To the jurisdiction of the court; II. To the person of the plaintiff or defendant; III. In bar of the suit.

Pleas three kinds.

I. A plea to the *jurisdiction of the court* does not dispute the right of the plaintiff, but simply asserts that the plaintiff's claim is not a fit subject for the cognizance of a court of equity, or of that court of equity; although, if the objection for want of jurisdiction be apparent on the bill, the proper defence is by demurrer. In a plea that the Court of Chancery is not the proper jurisdiction, it is not sufficient to allege merely that the court has no jurisdiction, but it must be shown what other court of equity has exclusive jurisdiction (*o*); as the Court of Chancery, being a superior court of general equitable jurisdiction, nothing shall be intended to be out of its jurisdiction which is not shown to be so (*p*).

To the jurisdiction.

II. A plea to the *person of the plaintiff* does not dispute the validity of the rights which form the subject of the suit, but denies the plaintiff's right to sue, alleging, either that he cannot sue at all or cannot proceed alone,

To the person of plaintiff.

(*m*) Mitf. 296.
(*n*) Kay *v.* Marshall, 1 Keen, 190.
(*o*) Earl of Derby *v.* Duke of Athol, 1 Ves. 202.
(*p*) Mitf. 263 (224).

or that he is not the person he pretends to be, or that he does not sustain the character he professes to assume (*q*). The plea to the person must show that he is disabled to sue, as being—

1. Outlawed, which is a good plea as long as the outlawry remains in force: but no plea of outlawry shall be allowed without pleading the record *sub pede sigilli* (14 Cons. Ord. r. 4). Outlawry in a plaintiff executor, or administrator, cannot be pleaded, because he sues in *autre droit*, nor against a person named in the bill as the next friend of an infant plaintiff. Formerly a plea, that the plaintiff was excommunicated, was a good plea, but such a disability no longer affects a person's civil rights (*r*).

2. That the plaintiff is a Popish recusant convict (*s*).

3. That the plaintiff is unable to sue, by reason of attainder in a præmunire, or in respect of treason or felony.

4. That the plaintiff is an alien. But an alien who is an alien friend is capable of suing for any personal demand (*t*); and even an alien enemy may sue, under some circumstances (*u*).

5. That the plaintiff is incapable of instituting the suit *alone*, as an infant, a *feme covert*, or lunatic, found so by inquisition.

6. A plea that the plaintiff is not the person he pretends to be, or does not sustain the character he assumes, is good; as where an executor filed a bill before probate of the will (*x*), unless he alleges that the will is proved (*y*); or when the plaintiff sued as administrator, and the defendant pleaded that he was not an administrator (*z*).

(*q*) Mitf. 221.

(*r*) 53 Geo. III. c. 127, s. 3.

(*s*) 3 Jac. I. c. 5, s. 11. But see 31 Geo. III. c. 32.

(*t*) 1 Atk. 51.

(*u*) 3 Burr. 1741.

(*x*) 2 Sim. 241.

(*y*) But if so alleged, it will suffice if probate is obtained before the hearing.

(*z*) Winn *v.* Fletcher, 1 Vern. 473.

7. Also, where the plea alleges that the plaintiff has no interest in the subject of the suit, or no proper title to institute a suit concerning it, or that the defendant has not any interest therein, so that there is no privity between plaintiff and defendant. The plea may also be sustained where one of two plaintiffs has no interest; and this will be a good defence to the whole bill (*a*). And a plea that defendant is not the person he is alleged to be, or does not sustain the character which he is alleged to bear, is good.

In bar of suit.

III. *Pleas in bar* are usually described as allegations of foreign matter, whereby, admitting the bill, so far as it is not contradicted by the plea, to be true, yet the suit, or so much of it as is covered by the plea, is barred (*b*). Pleas of this kind are divided into—1. Pleas in bar of matters recorded, or as of record in the court itself, or *some other court* of equity; 2. Pleas in bar of matters of record, or of matters in the nature of record, in some court *not being a court of equity;* and 3. Pleas of matters *in pais*. Under the former heads are considered:—

1. A decree of the court, by which the rights of the parties have already been determined, or some previous bill for the same cause dismissed; but a plea of such former decree must have been signed and enrolled, and the decree must be final, otherwise it will not operate as a bar to the suit, although the defendant may insist upon it by way of answer. A bill dismissed will be no bar

(*a*) See further on this head and some others above, Chap. X. on Demurrers, and Chap. III. on Parties.

(*b*) Mitf. 260 (221). But this description gives very little information or distinctive character to such pleas; ibid. The only thing of much use to state seems to be, that if no ground of plea can be raised under any of the preceding heads, a plea which yet raises some defence or bar to relief, is a plea in bar. Ibid. 277 (236).

unless dismissed on the merits, and not merely for want of prosecution or without prejudice. The only way in which a matter already determined in the court can be again raised there is by a petition of rehearing, where the decree has not been enrolled, and by a bill of review of a decree enrolled. But a decree may be impeached by an original bill for fraud, and the decree is no bar if the fraud be proved. Also the defendant may plead another suit, for the same cause, depending in the same or another court of equity. This plea does not seem to be in all cases an absolute bar unless there has been a decree. But it will lead to a reference to the chief clerk to inquire into the facts, and then the court may determine to allow the suit to continue notwithstanding (*c*). This plea must distinctly aver that the suit is for the same cause of litigation as the other; otherwise it will be overruled, as bad in point of form (*d*). If a plaintiff be proceeding at the same time against the defendant, both at law and in equity for the same cause, the defendant, on putting in his answer, may apply to the court, for the purpose of compelling the plaintiff to elect before what tribunal he will proceed;—but, if a party commence proceedings both at common law and in a court of equity, in his individual character, and not in *autre droit*, and can obtain in the former jurisdiction only a part of the relief which he can obtain in the latter; by instituting his suit in equity, he precludes himself from proceeding at law, and therefore is not entitled to the right of election (*e*).

The dependency of a former suit for the same matter is a good plea. But where the plaintiff disputes the truth thereof, he may, on motion or petition, of course, obtain an order for an inquiry as to its truth. And

(*c*) Mitf. 5th ed. *n.* (k) *et seq.* (*d*) Mitf.
(*e*) Mills *v.* Fry, 19 Ves. 227.

such order, and a certificate in pursuance thereof, shall be obtained within one month after the filing of such plea: otherwise the defendant may obtain, as of course, an order to dismiss the bill (14 Cons. Ord. r. 6).

2. Pleas in bar of matters of record, or of matters in the nature of matters of record, in some court *not being a court of equity*, are—

(1.) A plea of a fine and non-claim, which is considered as good an equitable as it is a legal bar, provided it be pleaded with proper averments: and herein it is said that seisin must be stated, otherwise the plea will be overruled, although the court will allow the defendant to amend (*f*).

There is a distinction as to equitable titles, for where equity charges the lands only, the fine bars; but, where it charges the person only in respect of the land, it does not operate as a bar. Thus, if a purchaser of an estate from a trustee has levied a fine, he will be considered in equity as standing precisely in the same situation and character as the trustee was, provided he had notice of the trust, or purchased without consideration (*g*). But, where a person comes in under a title adverse to the title to a trust estate, or comes in for a valuable consideration without notice of the trust, he may set up a fine and non-claim as a bar to the claim of a trust (*h*).

(2.) A plea of recovery duly suffered with the deed, leading the uses thereof, may be pleaded by the defendant if the estate tail limited to the plaintiff, or under which he claims, is thereby destroyed (*i*) *.

(3.) A judgment at law, or sentence of some other

(*f*) 2 Ves. 450.
(*g*) Mitf.
(*h*) Mitf.
(*i*) Mitf.

* It is presumed that a disentailing deed, under the 3 & 4 Will. IV. c. 74, abolishing fines and recoveries, will have the same effect in pleading as a fine and recovery formerly had.

court, provided the court has had full jurisdiction to determine the rights of the parties, and such rights have been fully determined therein. A sentence, also, in her Majesty's Court of Probate, in respect of a will and probate, will be considered a good plea to a bill exhibited by persons claiming as next of kin to one supposed to have died intestate, and against the heir if the heir has been cited in the Court of Probate (*k*).

Pleas in bar of matters *in pais*, which go both to the discovery and relief sought by the bill, or some part of it, or which sometimes extend no further than the relief or part of it, or the discovery or part of it, are—

1. A stated account, which must show that the account was in writing, or at least it must set forth the balance (*l*). If the bill charge that the plaintiff has no counterpart of the account, the latter should be annexed, by way of schedule, to the answer (*m*). The defendant ought to aver that the stated account is just and true, to the best of his knowledge and belief (*n*), and any error or fraud charged must be denied by the plea as well as by an answer accompanying it.

2. An award, which is a good plea to a bill to set aside the award and open the account, may not only extend to the relief, but also to the discovery sought by the bill; but if fraud or partiality are charged against the arbitrators, they must be denied, not only by the plea, but also by way of answer, as must any other matter charged to impeach the award.

3. A release by the plaintiff of the subject of his demand may also be set up as a good plea on the defendant's part, in bar of such demand: but the defendant must set out the consideration for which the release was

(*k*) 20 & 21 Vict. c. 77, ss. 61—64.
(*l*) 2 Atk. 299.
(*m*) 2 Atk. 299.
(*n*) Sch. & Lefr. 727.

granted; consequently, the plea of release cannot extend to bar a discovery of such consideration (*o*), and where that is impeached by the bill, on the ground of fraud, the plea must be supported by averments tending to falsify the allegations of fraud and weaken the position on which the consideration is sought to be impeached.

4. A will, or other instrument affecting the rights of the parties, may be pleaded by a devisee under the will, or a person to whom a conveyance has been made under the deed, to a bill instituted against them by the heir-at-law of the testator, in respect of the estate so devised or conveyed; and in these cases the devisee must plead the will, and that it was duly executed, and the defendant who claims under the conveyance may plead the instrument by which the property was conveyed to him by the ancestor.

5. The statute of 29 Car. II. c. 3, for preventing frauds, may be pleaded, as far as its provisions extend, in bar of a suit.

Thus, to a bill for a specific performance, a plea of the statute that there was no agreement in writing signed by the parties was held to be good (*p*). It was formerly a *vexata quæstio* whether this plea extended to the *discovery* of a parol agreement as well as the *relief* (*i. e.* the performance of it), except where the contract has so far been performed as to be considered a fraud on the party seeking the benefit of it, and otherwise rendering it impossible to put him *in statu quo* unless it were fully executed. But, after much doubt and contrariety of opinion upon the matter, it now appears decided that a plea of the statute does not extend to a bar of the discovery of the fact of an agreement, because, notwithstanding the

(*o*) Mitf. 262.

(*p*) Mussell *v.* Cook, Prec. in Ch. 533.

defendant in his answer confesses a parol agreement, yet if he insist on the protection of the statute, no decree can be pronounced against him on the ground of his confession (*q*).

Statute of Limitations may be pleaded.

The Statute of Limitations may be also the subject of a plea: but, although the statute is a bar to the claim of a debt, it was formerly considered as not capable of being pleaded to the discovery when the debt became due, for that would enable the court to see whether the time limited by the statute had elapsed; but the contrary doctrine now holds, on the principle that, where a demurrer to the relief would be good, it is equally available to the discovery on which the relief was founded (*r*). Any other statute, whether public or private, whereby the demands of the plaintiff may be barred, may be pleaded to avoid the equity attempted to be set up against the effect of the statute (*s*).

(*q*) Mitf. 267.

(*r*) Mitf. 313, 314 (269, 270). But this doctrine is questionable, as plaintiff is entitled to discovery concerning the issue of fact raised by the plea—viz., whether the debt became due more than six years ago. Cork *v.* Willcock, 5 Mad. 328; 1 Sim. & Stu. 6.

(*s*) In some of the foregoing examples reference has been made to an answer accompanying the plea. The office of the plea and its averments is to make out a complete defence. That of the *answer in support* of the plea is only to give discovery concerning the facts alleged in the plea when such answer is required by interrogatories. A very absurd rule requires that the answer shall not repeat the allegations of the plea, but must only relate to matter *tending* to prove or not the facts alleged in the plea,—the evidence relating to such facts. There is often great difficulty in framing a plea and answer in support, lest the plea should profess to bar more or less than it properly can bar, or the answer refer to matters covered by the plea from being answered. A plea also being only to part of a bill may be *accompanied by an answer* to the rest, and there is frequently difficulty in confining these two defences to their proper offices. Some of these difficulties are now met by

Equal equities.

If a plaintiff has a full title to the relief he prays, and the defendant cannot set up a defence as a bar of that title, yet, if the defendant has an equal right to the protection of the court of equity in defending his possession, as the plaintiff has to assert his right, the court will not interfere on either side; as where the defendant claims under a purchase or a mortgage for a valuable consideration, without notice of the plaintiff's title, which he may plead in bar (*t*). The want of proper parties may also be alleged by a plea in bar.

Objections to a bill for *discovery* only.

The foregoing objections to a bill, of which we have been speaking, extend to *discovery* as well as *relief* where the discovery was only sought for the purpose of relief. We shall now merely mention such as are a ground of plea to the *discovery* only. These are,—

1. That the plaintiff's case is not such as entitles a court of equity to compel a discovery in his favour.

2. That the plaintiff has no interest in the subject, or no interest in the suit, which gives him a right to enforce a discovery from the defendant, which may involve him in difficulty, or expense, or prejudice. As where a plaintiff in his bill alleges that he is heir or administrator of a person who died intestate, and seeks a discovery from the defendant, who is in possession of the deceased's property, and of his title thereto—a plea that another person is heir or personal representative is good.

3. That the defendant has no interest in the suit to entitle the plaintiff to call upon him even for a discovery

Ord. 14, rr. 8 and 9, before cited. But still a plea not properly supported by an answer giving the requisite discovery will be overruled; as would also a plea where a plea and answer constituting two defences to separate parts of the bill, purposely or carelessly, are so framed as to cover in part the same ground, and thus to make as to part of the relief two defences.

(*t*) Mitf. 274.

CHAP. X.

only, though he is alleged by the bill to have or claim such interest.

4. That the situation of the defendant may render it improper for a court of equity to enforce a discovery—1. Because the discovery may subject him to pains and penalties, or tend to accuse him of any crime; 2. Because it will subject him to forfeiture, unless the plaintiff be the only person entitled to the benefit of the forfeiture, and expressly waives it by his bill; 3. Because such discovery would betray confidence reposed in the defendant, as counsel, attorney, or arbitrator; and, 4. Because the defendant is a purchaser for a valuable consideration, without notice of the plaintiff's title; for, in this case, the court will not compel him to make a discovery of that which may affect his own title (*u*).

Duty of plaintiff for separating that which he may and may not require an answer to.

It is the duty of a plaintiff in framing his record, and in asking for a discovery, to separate the matters to which he is entitled to require an answer from those which he cannot legally call upon the defendant to discover; thus, where the plaintiff seeks discovery of matters which might subject the defendant to a criminal prosecution, and also seeks other discovery which might have been legitimately asked for, and which the defendant is bound to give, but are mixed up with other matters, or so connected with them, either by way of inference or of exclusion, that they might lead to a disclosure of circumstances which would subject the defendant to be prosecuted for the offence with which he was charged, he is not bound to answer any portion of it (*x*). And the defendant might always and may avail himself of the objections to discovery under class 4 above by answer (*y*).

(*u*) Mitf. 288.

(*x*) Earl of Lichfield *v.* Bond, 6 Beav. 94.

(*y*) See also Ord. 15, r. 4, under which a defendant may decline by answer to answer any part of an interrogatory which he might

Plea must be precise when not to the whole bill.

If the plea do not go to the whole bill, it must express to what part of the bill it does extend; therefore if the defendant plead to "such parts of the bill as are not answered," the plea will be overruled as too general. Generally, in pleading, equity requires the same strictness and precision as a court of law. It is said that a plea ought not to exhibit more defences than one; and, although a plea may be bad in part only, and therefore overruled as to that portion of it, and allowed as to the remainder, yet two defences in a plea will not be separated, and only one admitted as a bar.

If the bill contain any charge which, in equity, may operate in favour of the plaintiff's case against the matter pleaded, as fraud or notice of title, the charge must be denied by way of answer, as well as by averment in the plea (*z*). In this case, the answer will not support the plea unless it be full and clear. If the bill alleges facts which if true would contradict the allegations of the plea, or be evidence to disprove them; the plea must be supported by an answer giving discovery as to those facts (*a*).

Commencement of plea.

The form of a plea, like a demurrer, commences by a protestation against confessing the truth of any matter. For the sake of deciding the validity of a plea, the bill, so far as it is not contradicted by the plea, is assumed to be true. The extent of the plea, that is, whether it goes to the whole of the bill, or to part of it only, and to what particular part, must next be set forth clearly and dis-

have protected by demurrer. This, however, seems to relate (Leigh *v.* Birch, 32 Beav. 399) only to objections under class 4 above.

(*z*) Mitf. 298. But see note, *ante*, p. 412. The answer should only give discovery concerning the evidence of the facts averred in the plea.

(*a*) Hunt *v.* Penrice, 2 Eq. Rep. 209; 18 Jur. 4; 23 Law Jour. 339; 2 Week. Rep. 87; 17 Beav. 525.

tinctly. Then follow the defendant's grounds of objection to the jurisdiction of the court, to the person of the plaintiff, or in bar of the suit, supported by averments. The plea then concludes with a repetition that the matters so offered are relied upon as a bar of the suit, and prays judgment, whether the defendant shall be compelled further to answer the bill, or so much of it as is pleaded to (*b*).

Pleas to the jurisdiction, to the person, or in bar of any matter recorded (unless accompanied with averments of matter *in pais*) (*c*), do not require to be put in upon oath; but pleas of bars of matters *in pais* must be put in upon oath of the defendant (14 Cons. Ord. r. 2).

Practice when the validity of a plea comes on for argument.

When the validity of a plea comes on for argument, it may either be allowed simply,—that is, the plea is deemed a full bar to so much of the bill as it extends to,—or the benefit of it may be saved to the hearing, and is thus considered that, so far as it appears to the court, it may prove a defence, but that, supposing the matter pleaded be really true, there may be matter disclosed in evidence which would avoid it; or, lastly, it may be ordered to stand for an answer, which shows that it contains mater which may prove to be a defence, or part of a defence, but that it is not a full defence, or that it has been informally offered by way of plea, or that the answer has not sufficiently supported it, which renders the truth of it doubtful (*d*).

If a plea to the *whole* bill be ordered to stand for an answer, the plaintiff cannot except thereto unless by the order liberty is expressly given to except, because it is under these circumstances considered as a sufficient answer; an insufficient one being looked upon as no answer.

(*b*) Mitf.

(*c*) Wall *v.* Stubbs, 2 Ves. & Bea. 354.

(*d*) Mitf. 303.

The plea may also be allowed with liberty to plaintiff to amend his bill, but after plea allowed he may obtain such liberty, though in the case of a plea for want of parties such leave is of course.

Where plea untrue in fact.

If the plea, although good in point of form and substance, be untrue in fact, the plaintiff should take issue thereupon, by replying to it. This he may do before argument if he deems it good, and by so doing he admits it to be good in law. Or he may reply after it has on argument been held good (*e*).

After a plea has been overruled, the defendant cannot file another plea or demurrer without a special order for that purpose, nor can he, without such order, file a plea after a demurrer has been overruled (*f*).

When a plea is put in which shows that the plaintiff is not entitled to relief, it protects the defendant from making the discovery; but if the defendant, on the face of his plea, purports to plead to the relief only, he thereby admits the plaintiff's right to a discovery, and ought to give that discovery, otherwise the plea is bad (*g*).

A plea cannot be amended as of course; but the court will require a special application to be made by the defendant to amend.

Where a plea to the whole or part of a bill is allowed upon argument, the plaintiff, unless he undertakes to reply to the plea, or unless the court otherwise directs, shall pay to the party by whom the plea is filed the costs of the plea, and where the plea is to the whole bill, the costs of the suit also, and in such last-mentioned case the order allowing the plea shall direct the dismissal of the bill (14 Cons. Ord. r. 16).

(*e*) 2 Eq. Ca. Ab. 70; Mitf. 353 (302).
(*f*) 1 S. & S. 511.
(*g*) King *v.* Hemming, 9 Sim. 59.

CHAP. X.

Where plea is not set down for argument within three weeks.

When a plea to the whole or part of a bill is not set down for argument within three weeks from the filing thereof, and the plaintiff does not, within such three weeks, serve an order for leave to amend the bill, or does not within that time, by notice in writing, undertake to reply to the plea, it is to be held good to the same extent and for the same purposes, and the same costs are to be paid by the plaintiff, as in the case of a plea to the whole or part of a bill allowed upon argument; and where the plea is to the whole bill, the defendant, by whom such plea was filed, may, at any time after the expiration of such three weeks, obtain, as of course, an order to dismiss the bill (14 Cons. Ord. r. 17).

Where the plaintiff undertakes to reply to a plea to the whole bill, he shall not, without the special leave of the court, take any proceedings against the defendant by whom the plea was filed till after replication (14 Cons. Ord. r. 18).

The defendant cannot, whilst the plea is pending, move to dismiss the plaintiff's bill for want of prosecution; but if he be desirous of disposing of the suit, he must himself set down the plea for argument.

III. THE ANSWER—MODE OF PUTTING IN THE SAME—TIME, ETC.

Answer, nature of.

The defendant is compelled to make a full discovery of the facts charged in the plaintiff's bill, provided they be essential to enable him to obtain a decree, and are not such as would render the defendant liable either to a criminal prosecution or forfeiture; therefore, whenever he does not either plead or demur, or having done either, the plea or demurrer is overruled, he must put in his answer to the whole bill: and in case the plea or demurrer is allowed to only part of the bill, then he must answer to such part of the bill as is not covered by the

plea or demurrer, unless he disclaims. An answer is the most usual mode of defence, and, as it is capable of embracing more circumstances than a plea, it may, for this reason, be used with much greater propriety in cases where the defendant is not anxious to prevent a discovery, although the plea might be a complete bar; for where, by introducing additional circumstances, he has a good opportunity of showing his case in a more favourable light, the answer is the best mode of defence. Thus, where a bill is filed to set aside a contract, the purchaser may plead a valuable consideration, and no notice of plaintiff's title, which would be a good defence; but, if he can set forth the additional circumstance in his favour, of having expended large sums of money in improvements on the estate, with the plaintiff's knowledge, it would be more advantageous for him to bring the whole before the court by way of answer, which he cannot do in the plea; for by the introduction of such matters in the answer, thereby showing an acquiescence on the plaintiff's part, the case of the latter is considerably weakened. The defendant must not evade the material facts in the bill which he is called upon to answer, but either confess or traverse the substance of each charge, otherwise the answer may be excepted to; and where the charges are set out distinctly and precisely, and are specially interrogated to, they must be answered distinctly and precisely, and not generally, although such general answer may amount to a complete denial of the charges (*h*).

By referring back to p. 297, it will be seen that formerly the bill was made to consist of nine parts; therefore, until the 15 & 16 Vict. c. 86, s. 10, the interrogatories for the examination of the defendant, upon which he had to found his answer, were embodied in the bill of complaint, and these interrogatories were based upon the allegations

(*h*) Mitf. 310.

CHAP. X.

contained in the bill; but now, by virtue of the above Act, the bill itself is not to contain any interrogatories for the examination of the defendant, but shall contain, as concisely as may be, a narrative of the material facts on which the plaintiff relies, such narrative being divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be a separate and distinct statement or allegation, and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief.

Formerly, all the defendants to the suit, although mere formal parties, were required to answer the bill, except in the case where no direct relief was sought against a defendant. The expense and delay necessarily attendant upon this practice, occasioned it to be enacted, in accordance with the recommendation of the Chancery Commissioners (pp. 25—41), that the plaintiff in any suit commenced by bill may serve each defendant with the interrogatories required to be answered by such defendant only (sect. 12).

The object of these sections is to keep the facts and evidence distinct (*i*); therefore in the bill it is not necessary to aver the possession of documents in order to ground an interrogatory as to that fact (*k*).

The provision of this Act, therefore, renders it optional with the plaintiff, whether he will require an answer from the defendant or not. But should the defendant not be required to answer, and does not answer, he shall be deemed to have traversed the case made by the bill (sect. 26). Of the traversing note we shall speak presently. The effect of the defendant not answering, however, is, that he will be considered to have put in issue the alle-

TRAVERSING NOTE.

(*i*) Per V.-C. Wood, Perry *v.* Turpin, 23 Law Times, 87; Kay, App. 49.

(*k*) Ibid.

gations in the bill, so that the plaintiff must support his case by entering into evidence.

A defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer (15 Cons. Ord. r. 4).

Under this order it has been decided that the defendant shall not be deprived of the benefit to be derived from it, although the time for demurring has expired (*l*). And it applies as well to a case where a demurrer constituting the protection must have been a demurrer to the relief, as where it would have been a demurrer to the discovery only (*m*); and also where the bill is demurrable merely for want of parties, as to those in which it is demurrable for want of equity (*n*).

Ancient order of the court.

By one of the old orders of the court, where a bill charges a matter as the defendant's own act, his answer thereto must be direct, without saying it is to his remembrance, or as he believeth, if it be laid down within the seven years next previous; and if the defendant deny the charge, he must traverse it directly, and not by way of negative pregnant. "As, if a fact be laid down to be done with divers circumstances, the defendant may not traverse it literally, as it is laid in the bill, but must traverse the point of substance; so, if the defendant be charged with the receipt of 100*l*., he must traverse that he hath not received 100*l*., or any part thereof; and if he hath re-

(*l*) Drake *v.* Drake, 2 Hare, 647; 8 Jur. 642.

(*m*) Tipping *v.* Clarke, 2 Hare, 383; but see *contra*, Leigh *v.* Birch, 32 Beav. 399: it only applies where there is some objection in the nature of the discovery.

(*n*) Kay *v.* Wall, 4 Hare, 127, 283; 9 Jur. 128, 684.

CHAP. X.

ceived part, he must set forth what part" (*o*) (see also 15 Cons. Ord. r. 1).

When cause set down upon bill and answer.

If the plaintiff be satisfied with the statements and admissions contained in the defendant's answer, he may at once take steps to bring the cause to a hearing, or he may amend his bill; but should he be advised that the answer does not fully confess or avoid, traverse or deny, the material parts of the bill, he may except to the same for insufficiency, and, for this purpose, he states such parts of the bill as he conceives are not answered, and prays that the defendant may thereto put in a full answer. The exceptions require to be signed by counsel, and must, by Order 16, 8th May, 1845, art. 22, be filed within six weeks after the filing of the defendant's answer, otherwise the answer will be deemed sufficient* (16 Cons. Ord. r. 6).

Relevant matter—Scandal.

It has been held that nothing which may be considered to be relevant to the plaintiff's case is *scandalous*. Thus, where a creditor filed his bill against the debtor's executrix and her husband, stating that the defendant and his wife were persons of bad character, of drunken habits and violent behaviour, and in a state of great poverty, and stating various particulars in support of those allegations; moreover that the husband had said that he was willing

(*o*) Sand. Ord., 16 Jac. I., 29th Jan. 1618.

* The times of vacation shall not be reckoned in the computation of the times appointed or allowed for the following purposes:—

(1) Amending or obtaining orders for leave to amend bills.

(2) Filing or setting down exceptions for scandal or insufficiency, in cases where the time is not limited by notice given pursuant to the 6th rule of Cons. Ord. 42.

(3) Setting down pleas and demurrers.

(4) Filing replications or setting down causes under the 12th rule of Cons. Ord. 33, in cases where a defendant puts in an answer to amendments, to which the plaintiff has not required an answer (37 Cons. Ord. r. 13).

to perjure himself if he could get anything by it, and praying that the assets might be administered under the discretion of the court and for an injunction or receiver, it was held that the general statement and the instances were relevant to the relief called. It being material in a question about the administration of assets to make out that the person who has the power over and the management of them is a person of violent conduct and drunken habits, and therefore such statements were not scandalous (*p*). But it would seem, from Lord Langdale's opinion, in Williams *v.* Douglas, 5 Beav., that it lies upon the party inserting the matter complained of as scandal to show that it is material. A defendant shall not be bound to answer any statement or charge in the bill unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any of the interrogatories for the examination of the defendants, except those interrogatories which such defendant is required to answer. And where a defendant answers any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, his answer will be deemed impertinent (15 Cons. Ord. r. 3) (*q*).

Where the defendant has pleaded or demurred to one part of the bill which seeks a discovery, and answered the remainder, the plaintiff, by taking exceptions to the answer before the plea or demurrer is answered, admits the plea or demurrer to be good, but not so if the plea or demurrer extend only to the relief prayed for by the bill (*r*).

A defendant by his answer, denying or not admitting an agreement, may avail himself of the Statute of Frauds,

(*p*) Everett *v.* Prythergch, 12 Sim. 365.

(*q*) Gordon and Company *v.* Governor and Company of Bank of England, 4 Law Times, 371.

(*r*) Mitf. 317.

CHAP. X.

although he may not have referred to it in his answer (*s*); but if he admits the agreement he must claim the benefit of the statute by his answer, or he will be taken to have waived it (*t*).

Practice as to reading a document referred to in defendant's answer.

There is a rule which prevails in the courts of law, that, where a party produces a document which he has obtained by means of a defendant's answer to a bill of discovery only, the party shall not be allowed to read a portion merely of the answer, or the evidence thereby obtained, without reading the whole answer, unless a court of equity in which the bill was filed has interfered and ordered the document to be produced and read. This arises from the respect which a court of law pays to the order of the court of equity, in not allowing a document obtained through the intervention of the latter tribunal to be read alone, without inquiring into the grounds of the order (*u*).

Practice also at the hearing, as to reading part of answer.

Also, when the cause comes on for hearing, it is the practice that, whenever there is a passage in an answer relating to one part of the subject, and there is another passage in the answer relating to another part of the same subject, not in the same sentence, but connected in meaning with the first passage, and the plaintiff reads one of those passages as evidence, the court will compel him to read all other passages in the answer which are explanatory of the passage read, whether such other passages are connected in grammatical construction, or separated by passages relating to distinct subjects (*x*).

The answer of one defendant cannot be read against another defendant (*y*), because there is no issue between

(*s*) Ridgway *v.* Wharton, 2 Week. Rep. 137.

(*t*) Ibid.; Dan. 606, and cases there cited.

(*u*) Brown *v.* Thornton, 1 My. & Cr. 248.

(*x*) Freeman *v.* Tatham, 7 Law Times, 177.

(*y*) Jones *v.* Turberville, 2 Ves. 11; 4 Bro. C. C. 115; Morse *v.* Royal, 12 Ves. 361.

the parties, and no opportunity is given of cross-examination (*z*), except in an interpleader suit, to show that adverse claims are made (*a*). And also in the case of partnership liability arising from the privity and community of interest, each partner for such purpose being the agent for the other (*b*). It may also be so read where the suit is brought to a hearing on motion for a decree, and notice so to use it has been given (*c*); but it is even then only used as evidence, and not as an admission.

One answer read against another answer, not to affect a decree.

One answer may in some cases be used against another, so as to produce some influence on the judge's mind; but certainly not as evidence on which to found a decree (*d*). But there are some answers which, even against the defendants themselves, are of no use as evidence. The answer of an infant, for example, is not binding upon him. This arises from his presumed incapacity for managing his own affairs. His answer is therefore put in and sworn to by his next friend (*e*). But although the answer of an infant cannot be read against him, the answer of the person under whom he takes a derivative title may; thus, where there is a suit to establish a will against the heir, and the heir files his answer admitting the will, and dies before the hearing, the derivative heir, although

(*z*) Chervot *v.* Jones, 6 Madd. 268; Parker *v.* Morrell, 2 Ph. 453; 12 Jur. 253.

(*a*) 2 Eq. Ca. Ab. 67; 1 Smith, Ch. Prac. 454; Angel *v.* Haddon, 16 Ves. 203; Bowyer *v.* Pritchard, 11 Pri. 110; Green *v.* Pledgar, 3 Har. 165; Masterman *v.* Price, 1 C. Pur. Coop. t. Cotten. 383; Chervet *v.* Jones, ib. 6 Madd. 267.

(*b*) Stark. Evid. edit. 1853, p. 443.

(*c*) Dan. 781.

(*d*) Per M. R., in Hawks *v.* Howard, 10 Law Times, 3. See further, Stephens *v.* Heathcott, 8 W. R. 336; 29 L. J., Ch. 529; 36 L. T. 112; 6 Jur., N. S. 312.

(*e*) 2 Ventr. 72; Carth. 79; Comb. 156; Wrottesley *v.* Bendish, 3 P. Wms. 237; 3 Swan. 392.

an infant, will be bound by the admission, and the will therefore need not be proved (*f*). When also a married woman answers jointly with her husband, it cannot be read against him, although it may be sufficient as evidence against her, should she survive (*g*).

Generally speaking, defendants to a suit in the same interest should put in a joint answer; but there is no rule of court which renders it compulsory (*h*). The mere difference of residence alone is not sufficient to justify the parties in severing (*i*).

Answer signed by counsel.

The signature of counsel is essential to an answer. The defendant's answer is sworn by him at the office of the clerk of the records and writs, and also pleas, answers, affidavits, or affirmations, whereon to ground process of contempt. This is required to identify the answer which he has sanctioned by his oath, and more especially to render a conviction for perjury more easy (*k*).

Affidavits or affirmations, required to be annexed to bills, may be sworn, affirmed, or attested upon honour before any clerk of records and writs, or before the clerk of enrolments in chancery (1 Cons. Ord. r. 39).

Solicitor for two separate defences.

Under the 40th Cons. Ord. r. 12, where the same solicitor is employed for two or more defendants who have filed separate answers, the taxing-master shall, in his discretion, in the taxation of the solicitor's costs, consider whether such separate answers were necessary or proper; and if he be of opinion that the costs thereby occasioned are improperly incurred, he shall disallow them.

Formerly, when a defendant happened to reside in the

(*f*) Robinson *v.* Cooper, 4 Sim. 131; Loch *v.* Foot, ibid. 132.

(*g*) Wrottesley *v.* Bendish; Shelberry *v.* Briggs, 2 Vern. 249; 3 Atk. 648.

(*h*) Greedy *v.* Lavender, 18 Law Jour. 62.

(*i*) Far *v.* Sheriffe, 10 Jur. 630.

(*k*) 1 Newl. Ch. Pr. 132.

country, *i. e.* beyond twenty miles from London, his answer was taken before commissioners appointed for that purpose; but now the whole machinery as to taking answers, etc. *within* the jurisdiction is at once swept away, although the practice still exists as to the necessity of taking answers, etc. out of the jurisdiction in places where there is no properly constituted person having authority to administer oaths or taking affirmations; for by the 21st and 22nd sects. 15 & 16 Vict. c. 86, the practice of the said court, of issuing commissions to take pleas, answers, disclaimers, and examinations in causes and matters pending in the said court shall, with respect to pleas, answers, disclaimers, and examinations taken within the jurisdiction of the court, be and the same is hereby abolished; and any such plea, answer, disclaimer, or examination may be filed without any further or other formality than is required in the swearing and filing of an affidavit (sect. 21).

Practice of issuing commissions to take answers, etc. within the jurisdiction of the court abolished.

All pleas, answers, disclaimers, examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court of Chancery, and also acknowledgments required for the purpose of enrolling any deed in the said court, shall and may be sworn and taken in Scotland or Ireland, or the Channel Islands, or in any colony, island, plantation, or place under the dominion of her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of her Majesty's consuls or vice-consuls in any foreign parts out of her Majesty's dominions; and the judges and other officers of the said Court of Chancery shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, public person, consul, or vice-consul attached, appended, or subscribed to any

Pleas, declarations, etc. in Chancery, how to be sworn and taken in Scotland, Ireland, the Channel Islands, etc.

such pleas, answers, disclaimers, examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or other documents to be used in the said court (sect. 22).

From these last-mentioned sections it will be seen that a commission will seldom be required or had recourse to; but whenever it shall be necessary, the plaintiff will be at liberty to join in the commission for the purpose of seeing the answer taken, and two days' notice in writing must be given to the plaintiff's solicitor to give commissioners' names, to see it taken, and in default thereof the defendant may sue out the same directed to his own commissioners (9th Ord., Dec. 1833). Should the plaintiff wish to join in the commission, he must, within two clear days after service of the notice, furnish the defendant's solicitor with the names of one or two commissioners to act on his behalf, or in default thereof the commission will be directed to the defendant's own commissioners.

The writ must be prepared by the defendant's solicitor, and indorsed with the name and address of the solicitor or other party issuing it (3 Cons. Ord. rr. 1, 2, 5), as previously directed with respect to a bill, and also with the words "By the Court." It must then be sealed by the clerk of the records and writs (ibid. 4), as directed with respect to an attachment, and at the same time a præcipe must be left with him. By 43rd Ord., May, 1845, all commissions to take answers must be made returnable without delay.

Upon issuing the commission it is forwarded, together with the answer and all necessary instructions, to one of the defendant's commissioners to be executed.

If the plaintiff join in the commission, he is entitled to six days' notice of executing it. This notice must be signed by the defendant's commissioners; it is then served on the plaintiff's commissioners. Should the plaintiff's

commissioners neglect to attend, the defendant's commissioners may proceed to execute the commission *ex parte*. The commission, however, requires not less than two commissioners for its execution; and it is now enacted, that in future pleas, answers, or examinations, whether taken by commission out of the jurisdiction of the court or otherwise, may be filed without the oath of a messenger (15 & 16 Vict. c. 86, s. 25).

Answer to be preferred to oath of witness.

It is a general rule in equity that, if the answer of the defendant (which is usually put in upon oath) contain a positive denial of the statements contained in the bill, and is contradicted by nothing more than the positive assertion of one witness only, the plaintiff shall not have a decree; for the rule of evidence allowed by the court gives the defendant, in a great degree, the protection of his own conscience. But where the circumstances of the case so preponderate as to outweigh this rule, the court will give a greater degree of credit to the evidence of a single witness than to the positive denial contained in the defendant's answer (*l*). Hence the advantage which a defendant sometimes has when the bill imputes to him fraud.

Answer of defendant, on motion for decree or for injunction or receiver, etc., to be re-

Under the 15 & 16 Vict. c. 86, s. 15, where the suit is heard upon motion for decree, the answer, if filed, is to be treated for the purposes of the motion as an affidavit, and the plaintiff has been allowed to cross-examine de-

(*l*) East India Company *v.* Donald, 9 Ves. 283; Le Neve *v.* Le Neve, 3 Atk. 649; Janson *v.* Rany, 2 Atk. 140; Arnott *v.* Biscoe, 1 Ves. 97; Evans *v.* Bicknell, 6 Ves. 184. *Vide* also Spence, Eq. Jur. 625; Gres. Evid. 226-7; Story, Eq. Jur. 1528; Tayl. Evid. 1882 *et seq.;* Dan. 783; and see Williams *v.* Williams, 12 W. R. 663. *Sed quære,* whether this peculiar rule can be maintained now that the parties to the suit and their witnesses can be examined and cross-examined as freely as in a court of law, where the rule would be considered ridiculous. See Holderness *v.* Rankin, 2 De G., F. & J. 272; 6 Jur. 973.

CHAP. X.

garded as an affidavit.

fendant thereon, and he may read it against such defendant without notice, but as against other defendants he must give notice at the foot of his notice of motion: and by sect. 59, upon application by motion or petition to the court in any suit depending therein for an injunction or a receiver, or to dissolve an injunction, or discharge an order appointing a receiver, the answer of the defendant shall, for the purpose of evidence on such motion or petition, be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto.

Answer of peers, quakers, corporations, and foreigners.

Peers of the realm do not answer upon their oath but upon their honour, and a quaker answers upon his solemn affirmation. A corporation aggregate answer under their common seal and not upon oath. In the case of a foreigner, if he answer in his own language, it is necessary to file a sworn translation with it (*m*).

When taken without oath.

If the suit be a friendly one, the answer may be put in without oath, or without the signature of the defendant, which is done by order obtained upon motion or petition of course, with consent of the plaintiff, which consent is signed by his solicitor (3 Cons. Ord. rr. 1, 2).

Answer by guardians of infants.

It has been before stated that an infant sues by his next friend; but his answer is taken by a guardian who is appointed by the court, who assign him a fit person as his guardian *ad litem*. Idiots and lunatics, if found so by inquisition, answer by their committees; but if no inquisition has been had, they answer by their guardian appointed for that purpose. If an infant happen to be a married woman, the joint answer of herself and husband will not be received until a guardian has been appointed (*n*).

Committees of lunatics.

Not usual to amend answer.

It is not usual, when once the answer is filed, for the court to grant leave for the defendant to amend it. He

(*m*) Simmonds *v.* The Countess du Barre, 3 Bro. 263.

(*n*) Colman *v.* Northcote, 2 Hare, 147; 7 Jur. 528.

must apply for leave to put in a supplemental answer, and for this purpose a notice of motion must be given, accompanied by an affidavit, that the defendant, when he put in his original answer, did not know the circumstances upon which he makes the application, or any other matter upon which he ought to have stated the fact in a different manner (*o*).

Formerly the defendant was allowed six weeks after appearance to plead, answer, or demur (not demurring alone) to any original or supplemental bill to which an answer was required; but this time, through the recommendation of the Chancery Commissioners, has been considerably abridged (Rep. pp. 25, 41).

It will be observed, that if the defendant is not required to answer, but still wishes it, he must do so within fourteen days after the expiration of the time within which he might have been served with interrogatories for his examination in answer to such bill (37 Cons. Ord. r. *5); that is, eight days after the time limited for appearance, which is eight days after service of the bill—in all *thirty days after service of the bill.*

A defendant *required* to answer a bill must put in his plea, answer, or demurrer thereto, not demurring alone, within *twenty-eight* days from the *delivery* to him or his solicitor of a copy of the *interrogatories* which he is required to answer; but the court shall have full power to enlarge the time from time to time upon application being made to the court for that purpose (37 Cons. Ord. r. 4).

Court or judge may order defendant to procure documents, etc. on oath.

It shall be lawful for the court, upon the *application of the plaintiff* in any suit in the said court, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the

(*o*) 8 Ves. 79; 2 Ves. & Bea. 163.

CHAP. X.

production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just (sect. 18).

Upon application of defendant, after answer, plaintiff may be required to produce documents on oath.

It shall be lawful for the court, upon the *application of any defendant* in any suit, but where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the court shall make any order to the contrary, to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just (sect. 20).

Time for answering sometimes extended.

The defendant may sometimes obtain a longer time for the purpose of putting in his answer than that which is allowed by the strict practice of the court. This was formerly done by petition or motion; but by the statute 3 & 4 Will. IV. c. 94, s. 13, it was enacted that the masters in ordinary shall hear and determine all applications for time to plead, answer, or demur, and for leave to amend the bill, and for enlarging publication, and all such other matters relating to the conduct of suits in the said court, as the lord chancellor, with the advice, etc., shall direct.

Under the 15 & 16 Vict. c. 80, the judges in chancery have agreed that all applications for the above purposes shall be made at chambers.

The power of the court to grant further time for pleading, answering or demurring to any bill upon the application of any defendant or defendants thereto, whether required to answer the bill or not, shall remain in full force, and shall not be in anywise prejudiced or affected;

and if the court shall grant any further time to any defendant for pleading, answering, or demurring to the bill, the plaintiff's right to move for a decree under the provisions thereinafter contained shall in the meantime be suspended (15 & 16 Vict. c. 86, s. 13).

Where under an order allowing a defendant further time to answer it is intended that the defendant shall be limited to putting in an answer only, it should be so specified in the order, otherwise the defendant may file a plea (*p*).

The answer may be in form similar to that set out in schedule C, in 15 Cons. Ord. r. 1, with such variations as the nature and circumstances of each particular case may require (see Ord. 21, 1st section); and by sect. 14 of 15 & 16 Vict. c. 86, it is enacted, that the answer of the defendant to any bill of complaint in the said court may contain, not only the answer of the defendant to the interrogatories so filed as aforesaid, but such statements material to the case as the defendant may think it necessary or advisable to set forth therein, and such answer shall also be divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be a separate and distinct statement or allegation (sect. 14). Thus in part the answer is a *pleading*, and should therefore raise all those questions of fact or law which are not raised by the answers to the interrogatories, and upon which defendant intends to rely. Defendant should thus give notice of his defences. And though if defendant not required to answer do not do so, he is taken to have traversed the plaintiff's case; yet, if he do put in a voluntary answer, he must show what his defences are.

Defendant's answer may contain not only answer to interrogatories, but statements material to his case.

It may be remarked that, although an application for leave to *examine witnesses*, and to enlarge the time for

Application for leave to examine wit-

(*p*) Hunter *v.* Nockolds, 2 Phil. 540; 12 Jur. 149.

CHAP. X.

nesses, how made.

closing evidence, may seem to come within the letter, yet it does not fall within the meaning of the Act; and therefore, as applications of this sort are often most special in their circumstances, a motion for that purpose ought to be made to the court in the first instance (*q*). Where, also, the object to amend is by *striking out the name of a plaintiff*, application must be made to the court in the first instance, as the jurisdiction at chambers in applying for leave to amend is confined to those cases only where a mere amendment is required, and not where the result of the application would be to alter the defendant's security with respect to costs (*r*). Before a cause is heard, the usual application to amend the record by adding parties is to the judge at chambers. If, however, when a cause comes to a hearing it appears to be necessary that other parties should be added, the court will adjourn the cause, and give leave to amend by adding such parties; and if in making the amendment it be found requisite to add parties not contemplated by the court, leave to make such further amendment must be obtained from the court which has granted the former permission (*s*).

IV. DISCLAIMER.

Disclaimer put in when defendant has no title.

If the defendant claim no right or title to that which is made the subject of demand by the plaintiff's bill, he may disclaim or renounce all pretence of title to such matter. A disclaimer, when accompanied by his answer, is put in upon oath of the defendant, and must be signed by him; and notwithstanding it is, strictly speaking, distinct from an answer, yet it cannot often be filed alone, but it is usually put in under the title of an answer. For,

(*q*) Carr *v.* Appleyard, 2 My. & Cr. 476.
(*r*) Read *v.* Treacher, 2 Keen, 318.
(*s*) Biedermann *v.* Seymour, 2 My. & Cr. 117.

although the defendant may not, at the time he disclaims, possess any interest in the matter, yet he might have had an interest which he has parted with, and this circumstance it seems would entitle the plaintiff to an answer as to the certainty of the fact, and for the purpose of ascertaining who should be party in respect of such interest. The form of a disclaimer simply would be, that the defendant disclaims all right and title to the matter in demand. A defendant who disclaims may be examined as a witness by a co-defendant (*t*), although the plaintiff could not take advantage of such defendant's evidence, in proof of his own right, to the prejudice of another defendant (*u*). But the 6 & 7 Vict. c. 85, provides that, in courts of equity, any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions.

Generally speaking, when the bill alleges simply that the defendant claims some interest in the property in dispute, and the defendant says that he claims no interest, —or, in other words, puts in a simple disclaimer,—that is a sufficient answer to the allegation; for it removes the only ground on which he was made a party to the suit; but where the bill, in addition to the allegation of the claim of interest, states other facts which seek to charge the defendant with an interest or a liability, or where it contains various allegations tending to show that he had rendered the suit necessary by his personal conduct, and prays that he may pay the costs of the suit, it is not sufficient that such defendant puts in a mere disclaimer, but he must answer the bill fully (*x*).

Effect of inconsistency between an-

Should there appear any inconsistency between the answer and disclaimer, the matter will be taken more

(*t*) 7 Ves. 267. (*u*) 2 Atk. 39.

(*x*) Graham *v.* Cape, 9 Sim. 93.

strongly against the defendant upon the disclaimer than upon the answer, since it is only by the latter that the truth of the defendant's title can be ascertained. In the case of a general disclaimer by the defendant, the bill is usually dismissed against him with costs (*y*). But if plaintiff shows probable cause for making defendant a party in respect of his interest or claim, he may have a decree against him upon the ground of his disclaimer (*z*). And should a defendant disclaim all interest in the suit at the bar, yet if there be any question whether he has documents relating to the suit in his possession which ought to be delivered up, the court will retain him upon the record and direct an inquiry upon the subject (*a*).

(*y*) Gabriel *v.* Sturgis, 10 Jur. 215.
(*z*) Mitf. 319.
(*a*) Teed *v.* Carruthers, 2 You. & Col. 31.

CHAPTER XI.

EXCEPTIONS TO ANSWER—WHEN ANSWER IS DEEMED SUFFICIENT.

THE defendant having filed his answer, the plaintiff, if he be advised that it contains any matter altogether unnecessary or irrelevant to the subject of the suit, may refer the same for scandal; and, if reported as such, the scandal will be ordered to be expunged from the record: he may also except for insufficiency, which must be done within a limited time, otherwise the answer will be taken to be sufficient.

Scandal.

Scandal is anything alleged in the bill, answer, or other pleading, in language which is unbecoming the court to hear, or contrary to good manners (*a*); or anything set forth which charges a person with a crime not necessary to be shown in the cause. But nothing relevant is considered scandalous unless on the ground of the language used.

Impertinence.

Impertinence is where the pleadings are stuffed with long recitals, or where they consist of digressions as to matters of fact, which are altogether unnecessary and totally immaterial to the point in question (*b*).

Before the passing of the 15 & 16 Vict. c. 86, the plaintiff might file his exceptions for impertinence as well as for insufficiency of answer; but impertinent matter being in a technical point of view regarded only as re-

(*a*) Doc. & Stud. b. ii. c. 38.
(*b*) Wyatt's P. R. 383.

CHAP. XI.

dundancy or matter which is merely surplusage, it is now only to be considered with reference to costs, for it is by the 17th section enacted that the practice of excepting to bills, answers, and other proceedings in the said court, for impertinence, shall be and the same is hereby abolished: provided always, that it shall be lawful for the court to direct the costs occasioned by any impertinent matter introduced into any proceeding in the said court to be paid by the party introducing the same, upon application being made to the court for that purpose.

Practice of excepting to bills, answers, etc., for impertinence, abolished.

Proviso as to costs.

An affidavit containing scandalous and irrelevant matter may be ordered to be taken off the file (*c*).

It is no new thing, and precedents may be found, where the court has ordered counsel to pay the costs of expunging any impertinent matter from the record out of his own pocket.

Whether the answer be filed in term time or vacation, the plaintiff is allowed six weeks from such filing, within which he may file his exceptions for insufficiency, not computing the several periods between the vacations, as mentioned in a note in the previous chapter (*d*). The plaintiff is allowed the same time to except to an answer to an amended bill as to the answer to an original bill, although such answer is also a further answer to the original bill (*e*).

Time for excepting.

At the expiration of eight days from the filing the exceptions to the defendant's answer, but not before (unless in a case of election he is required by notice in writing from such defendant to set them down within four days of such notice, pursuant to 42 Cons. Ord. r. 6), the plaintiff must set them down for hearing after the

Reference to

(*c*) Goddard *v.* Parr, 3 W. R. 633; Kernick *v.* Kernick, 12 W. R. 335.

(*d*) 37 Cons. Ord. r. 13, art. 1, 2, 3, 4.

(*e*) Lloyd *v.* Clark, 7 Jur. 568.

eight days, but within fourteen days from the filing of such exception; but if he does not do so within the fourteen days, the answer is to be deemed sufficient (16 Cons. Ord. r. 12). master for insufficiency.

The eight days which must elapse between the expiration of the six weeks before mentioned, when the exceptions are filed, and setting them down for hearing, are allowed the defendant to determine whether he will submit to answer such exception. Should the defendant, not being in contempt, submit to exceptions to his answer for insufficiency before the plaintiff has set them down for hearing, he is allowed fourteen days from the date of the submission, within which he is to put in his further answer (16 Cons. Ord. r. 9). After the defendant has filed his second and third answer, which the plaintiff considers insufficient, he must, within fourteen days (16 Cons. Ord. r. 13) from the time when it was filed, set down the old exceptions, or the answer will be deemed sufficient. Why eight days given before order of reference.

1st. Although an answer may in itself be insufficient, yet it shall be deemed sufficient if the plaintiff do not except thereto within six weeks from the day on which it is filed, not accounting the interval between the seal days or vacations.

2nd. If the plaintiff except but do not set down the exceptions for hearing within the fourteen days from filing the same.

3rd. If within fourteen days after filing a further answer the plaintiff does not set down the old exceptions (16 Cons. Ord. r. 16, art. 1, 2, and 3).

Exceptions to answers for insufficiency are to be set down for hearing by the registrar, at the request of the party filing the same, upon the production of a certificate of the clerk of the records and writs of the filing of such exceptions, or (in the case of exceptions to an answer for

CHAP. XI.

insufficiency) of the filing of a further answer, and the same are to be advanced and put in the paper for hearing on an early day, and the party setting down any such exceptions shall, on the day on which the same shall be so set down, serve a notice thereof on the party whose pleading or other matter is excepted to, otherwise the exception shall be deemed not set down (12 Cons. Ord. r. 10).

If upon the hearing of exceptions the answer be held sufficient, it shall be deemed to be so from the date of the order made at the hearing; and if the defendant submit to answer without an order from the court, the answer shall be deemed insufficient from the date of the submission (16 Cons. Ord. r. 18).

Where, after a defendant's second or third answer is filed, the plaintiff sets down the old exceptions for insufficiency, the particular exception or exceptions to which he requires a further answer shall be stated in the notice of setting down such exceptions (16 Cons. Ord. r. 17).

Where, after exceptions to an answer for insufficiency are set down for hearing, a defendant not being in contempt submits to answer, or where the court holds the first or second answer to be insufficient, the court may appoint the time within which such defendant shall put in his further answer (16 Cons. Ord. r. 14). And if he does not answer within the time so allowed or appointed, or obtain further time and answer within such further time, the plaintiff may sue out process of contempt against him (16 Cons. Ord. r. 15).

Effect of 16 Cons. Ord. r. 20.

Although an answer had been referred for insufficiency, it might afterwards have been referred for scandal; for the court, ever anxious to keep its records pure, would not be made the medium of scandal, although the parties might, by their own act, have waived their right to except

for impertinence (*f*). But it seems that this distinction in practice is intended to be abolished; for 16 Cons. Ord. r. 20, declares that where a party having filed his exceptions for *scandal* does not set the same down for hearing within six days after such filing, they are considered as abandoned, and the costs are to be paid by the exceptant.

Application by a stranger to the record, to refer for scandal.

In an anonymous case (*g*) *, Sir John Leach, V.-C., held that no application made by a stranger to the record to refer a bill for scandal could be supported, inasmuch as he could not take an office-copy of the bill for the master to decide upon the question of scandal; besides this, the party has his remedy at law, if he be libelled by the record, as well as by any other writing. The same learned judge, in pronouncing his judgment, said that he had conversed with the lord chancellor (Eldon), who had concurred with him in his opinion upon the subject.

But upon a former occasion (*h*) his Lordship seems to have been of a different opinion; wherein he not only held that one defendant might refer the answer of another defendant for scandal, although he did not recollect an instance of such an application by a defendant (such instances having occurred only upon the motion of plaintiff), but said he would not lay it down as a rule, that a person not a party to the record could not be heard upon such an application.

Williams *v.* Douglas.

In Williams *v.* Douglas (*i*) (referred to *ante*, p. 423), it was held that a stranger to the cause may, upon a special application to the court, except to and refer a pleading for scandal, although he cannot do so *ex parte*.

Effect of scandal.

In this case, the master of the rolls, alluding, doubtless,

(*f*) 2 Madd. 344. (*g*) 4 Madd. 252.

* This case, the name of which was not known to Mr. Maddock at the time it was decided, appears from the Reg. Lib. to have been that of Porter *v.* Evors, *ex parte* Morgan.

(*h*) Coffin *v.* Cooper, 6 Ves. 514. (*i*) 5 Beav. 82.

CHAP. XI.

to the opinion expressed by Sir J. Leach in 4 Madd., said that it was a most serious matter to consider whether it be possible for a party to introduce on the record scandalous matter greatly prejudicial to a stranger to the suit, without the latter having an opportunity of applying to be relieved from the imputation, to the injury of his memory for ever. "Effectual justice," said his Lordship, "to a person aggrieved by such scandal, cannot be obtained by means of an action, or any succession of actions. Whilst the record remains unaltered, there is scandal—a perpetual reproach and shame, for which no just damages can be assessed, no just compensation ever given, and which can only be removed by the authority of this court. I own that I cannot attribute much weight to the objection (which the court could, by its own order, so easily remove), that a person, not a party to the cause, has no right to an office copy of the bill. And I see no hardship in compelling a party, who has introduced into the record contumelious matter amounting to scandal, to show that it is material to the purpose of justice."

Defendant, although in contempt, may except for scandal.

Although a defendant be in contempt for want of an answer, he may except to a bill for scandal, for, until the reference for scandal be disposed of, the defendant cannot tell what it is he is bound to answer (*k*).

(*k*) Everett *v.* Prythergch, 12 Sim. 363.

CHAPTER XII.

AMENDMENT OF PLAINTIFF'S BILL—TIME ALLOWED TO AMEND—DISMISSING A BILL FOR WANT OF PROSECUTION.

WHENEVER there happens to be a disclosure of new facts, which, although they existed before the commencement of the proceedings, the plaintiff could not fairly be presumed to have been acquainted with at the time, but have come to his knowledge subsequent to filing the bill, either by his own exertions, or from any matter offered or confessed in the defendant's plea or answer, he may obtain leave to amend his bill, and frame it according to the newly-developed circumstances; he will not, however, be allowed, by such amendments, to alter the entire nature and substance of the record: when, therefore, any event has arisen subsequently to filing the bill, whereby a new title arises, that circumstance cannot be introduced by way of amendment, but must be made the subject of a supplemental bill, subject, however, to the alterations made by 15 & 16 Vict. c. 86, s. 53.

The order to amend is, according to the peculiar circumstances of the case, obtained either, 1st, on motion or petition of course; 2ndly, on special application, formerly to one of the masters in ordinary, but now to the judge at chambers: this is by virtue of the 15 & 16 Vict. c. 80 (the Act for abolishing the master's jurisdiction); or, 3rdly, on special application to the court.

The plaintiff having obtained an order for leave to

CHAP. XII.

amend his bill shall, in all cases in which no other time is limited by such order, have fourteen days after the date of the order within which he may amend his bill (9 Cons. Ord. r. 17).

If, after leave obtained, the plaintiff does not obtain an order to enlarge the time, and does not amend his bill within the time limited by the order to amend, or if no time be so limited, then within fourteen days from the date of such order, the order to amend shall be void, and the cause as to dismissal shall stand in the same position as if such order to amend had not been made (33 Cons. Ord. r. 11).

When the plaintiff amends his bill without requiring an answer to the amendment, a defendant who has answered or has not been required to answer the original bill, but desires to answer the amended bill, must put in his answer thereto within fourteen days after the expiration of the time within which if an answer had been required he might have been served with interrogatories for his examination in answer to such amended bill, or within such further time as the judge shall allow (37 Cons. Ord. r. 7).

Any defendant may upon notice move to dismiss the bill with costs for want of prosecution, where the plaintiff after answer amends his bill without requiring an answer to the amendment, and, having obtained no order to enlarge the time, does not file the replication or set down the cause to be heard on bill and answer, or set down a motion for a decree or decretal order, within the terms following:—

(1.) Within one week after the expiration of the time within which such defendant might have put in an answer, in cases where the defendant does not desire to answer amendments.

(2.) Within fourteen days after the refusal to allow

further time, in cases where the defendant desiring to answer has not put in his answer within the time allowed for that purpose, and the judge has refused to allow further time.

(3.) Within fourteen days after filing of the answer, in cases where the defendant has put in an answer to the amendments, unless the plaintiff has within such fourteen days obtained a special order for leave to except to such answer or re-amend the bill (33 Cons. Ord. r. 12, arts. 1, 2, 3).

In every case where the plaintiff amends without requiring a further answer to the amended bill, it should be so stated in the order, otherwise it is irregular (*a*).

And under the new practice, where a defendant not being required to answer does answer notwithstanding, the plaintiff cannot obtain an order as of course for leave to amend after four weeks from the time of filing the answer (*b*).

As to counsel's signature to amended bills.

It is necessary in all amended bills that the counsel should sign his name; and if he be the same who drew the bill, which is most likely to be the case, and a new engrossment or a reprint be required, he ought to erase his name as it formerly stood to the bill, and re-sign it to the amended bill. Where, however, no reprint is required, and the draft of the amended bill is signed by the same counsel who signed the draft to the original bill, there is no necessity that the counsel's name should be repeated; but if the amendment be made by another counsel, it seems that a second signature by that counsel will be required (*c*).

Amendment

The plaintiff is at liberty *before* answer to amend the

(*a*) Boddington *v.* Woodley, 9 Sim. 380.

(*b*) Rogers *v.* Fryer, 2 Eq. Rep. 253; 2 Week. Rep. 67.

(*c*) Webster *v.* Threlfall, 1 Sim. & Stu. 137; Birch *v.* Rich, 1 Russ. & My. 157; 1 Dan. Pr. 547 *n.*

CHAP. XII.

of plaintiff's bill *before* and *after* answer.

record as often as he pleases, upon motion or petition, without notice (*d*), but *after* answer he is allowed one order only for leave to amend in the *usual form;* and afterwards no further leave will be granted before filing or undertaking to file his replication, unless the judge sitting in chambers shall be satisfied by affidavit that the draft of the intended amendments has been settled, approved and signed by counsel, and that they are not intended to be made for the purpose of delay or vexation, but because the same are considered to be material to the case of the plaintiff (*e*). And no order to amend shall be made before filing, or undertaking to file, a replication, unless such order be obtained within four weeks after the answer, if there be only one defendant; or, where several defendants, they all join in the same answer—or after the last of the answers, if there be two or more defendants—is to be deemed sufficient, after which a special application must be made, grounded upon a further affidavit, showing that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill (*f*).

The above-mentioned affidavits as to the necessity of the amendments are to be made by the plaintiff and his solicitor, or by the solicitor alone, in case the plaintiff, from being abroad or otherwise, is unable to join therein (9 Cons. Ord. r. 16).

Clerical errors, names, dates, etc.

This order does not extend to amendments which are made only for the purpose of rectifying some clerical error, or error in names, dates, or sums, and which may be obtained at any time upon motion or petition without

(*d*) Bird *v.* Hulster, 1 Russ. & My. 325; Collingworth *v.* Grundy, 2 My. & K. 359; 9 Cons. Ord. rr. 8 and 9.

(*e*) This does not mean that he may not obtain an enlargement of time.

(*f*) 9 Cons. Ord. r. 68.

notice (*g*); neither are the words "last of the defendants" to be taken without qualification, since it is not the answer of every defendant that the court will wait for, as where for instance a defendant is out of its jurisdiction; for if the suit must be delayed because new defendants have not answered, the plaintiff, by adding new defendants to the record, might obtain any length of time (*h*).

After the plaintiff has filed or undertaken to file a replication, or after the expiration of four weeks from the time when the answer or the last of the answers required to be put in is to be deemed or is held to be sufficient, a special order for leave to amend a bill shall not be granted without further affidavit, showing that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into such bill (9 Cons. Ord. r. 15).

But where, after a replication had been filed, the plaintiff had, on special leave, amended his bill in such a manner as to call for an answer, it was determined that he might afterwards obtain, as of course, a further order to amend at any time before the answer to the amended bill was filed (*i*).

Times of vacation not reckoned.

The times of vacation are not to be reckoned in the computation of the time allowed the plaintiff for amending or obtaining orders for leave to amend his bill (37 Cons. Ord. r. 13).

Effect of amending plaintiff's bill.

The effect of the plaintiff amending his bill is to prevent the defendant from moving to dismiss the bill for want of prosecution; and by the 33 Cons. Ord. r. 10, arts. 1, 2, and 3, any defendant may upon notice move

(*g*) *Vide* 9 Cons. Ord. r. 9.

(*h*) Bartolacci *v.* Johnstone, 2 Hare, 632; Marquis of Hertford *v.* Suisse, Rolls, 8 Jur. 117.

(*i*) Wharton *v.* Swann, 2 My. & K. 362.

that the bill may be dismissed with costs for want of prosecution, and the court may order accordingly :—

(1.) Where the plaintiff, having obtained no order to enlarge the time, does not, within four weeks after the answer or last of the answers required to be put in by such defendant is held or deemed to be sufficient, or after the filing of a traversing note against such defendant, file the replication, or set down the cause to be heard on bill and answer, or serve a notice of motion for a decree or decretal order, or obtain and serve an order for leave to amend the bill; or

(2.) Where the plaintiff, having undertaken to reply to a plea filed by such defendant to the whole bill, does not file his replication within four weeks after the date of his undertaking; or

(3.) Where the plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard, and obtain and serve a *subpœna* to hear judgment within four weeks after the evidence has closed.

Where plaintiff admits sufficiency of defendant's answer.

The plaintiff, by amending after having excepted to defendant's answer, waives the benefit of the exceptions, unless he make a special application to amend without prejudice to such exceptions.

If, after the defendant has answered, the plaintiff amend his bill otherwise than by adding parties, he is considered, by such amendment, as having admitted the sufficiency of the answer, and therefore he is precluded from afterwards excepting to the answer. Upon the same principle, if the plaintiff take exceptions to the answer, and they are submitted to or allowed, and he then amend his bill, he cannot take any new exception as to that part of the bill which has not been amended, unless the amendments vary the meaning of such part so as to make it

part of the amendment; for in this case the plaintiff, by excepting and then amending, admits the sufficiency of the answer, except that part of it to which the exceptions refer (*k*).

Dismissing bill for want of prosecution.

If the plaintiff, as before stated, neglect to prosecute his suit within four weeks after the defendant's answer is deemed sufficient, or do not amend within the time, the defendant is at liberty, at the expiration of that period, to give notice of motion to dismiss the plaintiff's bill, with costs, for want of prosecution.

In a suit against several defendants, any one of them is allowed, on his own behalf, to dismiss the plaintiff's bill without calling upon his co-defendants to join with him in an application to the court for that purpose. One plaintiff may also apply, as far as relates to himself, that the bill may stand dismissed, without the concurrence of the other co-plaintiffs, provided he do not thereby prejudice their claims.

In computing the time in which a bill may be dismissed on the ground that no prosecution has been taken since the answer was filed, the intervals between the seals are not to be reckoned (*l*).

If the plaintiff amend his bill, but by his order does not require the defendant to answer such amended bill, the defendant is at liberty, unless the plaintiff file his replication within fourteen days after the service of notice that his bill has been amended, to give notice of motion to dismiss the same for want of prosecution, provided he be in other respects in a fit position so to do.

(*k*) Taylor *v.* Bailey, 3 My. & Cr. 682.

(*l*) Attorney-General *v.* Jones, 5 Sim. 246; Angel *v.* Wascomb, 1 My. & Cr. 48.

CHAPTER XIII.

HEARING—BILL AND ANSWER—REPLICATION—MOTION FOR DECREE.

Bill and answer.

If the plaintiff neither except to the answer for insufficiency, nor refer the same for scandal within the period allowed from the time of its being filed, he may adopt one of three courses to bring the suit to a hearing:—

Effect of setting cause down upon bill and answer.

1. Should the plaintiff deem the allegations in the bill so far admitted by the answer that he can obtain the decree he seeks, or so much thereof as he may choose to be satisfied with, he may set down the cause upon bill and answer. He will then be bound by the statements in the answer as he finds them.* He can neither rely upon any matter not imported in the answer nor deny any facts stated therein. So that, where the cause is thus set down without any replication filed, the answer, so far as it goes, is evidence in the defendant's own favour. But the whole answer must be read, and must be considered in all respects true.

2. The plaintiff may file a replication, which is no longer a tender of issue but a joinder in issue, and puts the whole averments of the bill and answer in issue; or

* Admissions are either by the rules of pleading or by force of the terms in which they are expressed. They are of the former kind on the part of the defendant when he puts in his demurrer, and on the part of the plaintiff when he files no replication, but brings the cause to a hearing upon bill and answer.—Gresley's Evid. in Equity, p. 22.

if an answer has not been required nor put in, the defendant is taken to have traversed the allegations of the bill, and the replication puts them in issue. Where the plaintiff has replied to the answer, it cannot be read by the defendant as evidence unless upon a question of costs (*a*); but it is now a frequent practice for such defendant to file a short affidavit verifying the statements contained in his answer, in order to make it evidence on his own behalf (Dan. Pr. 782, n. (*l*)). The plaintiff may, however, read defendant's answer against him as a pleading, so that it is available for plaintiff so far as any admissions in it go.

3. The plaintiff may, instead of filing a replication, give notice of motion for a decree. The answer, if any, is on such motion treated as an affidavit.

Plaintiff may, on expiry of time for answering, but before replication, move for a decree or decretal order.

15 & 16 Vict. c. 86, s. 15, enacts that the plaintiff in any suit commenced by bill shall be at liberty, at any time after the time allowed to the defendant for answering the same shall have expired (but before replication), to move the court, upon such notice as shall in that behalf be prescribed by any general order of the lord chancellor, for such decree or decretal order as he may think himself entitled to; and the plaintiff and defendant respectively shall be at liberty to file affidavits in support of and in opposition to the motion so to be made, and to use the same on the hearing of such motion; and if such motion shall be made after an answer filed in the cause, the answer shall, for the purposes of the motion, be treated as an affidavit. And section 26 also provides that in suits commenced by bill, where notice of motion for a decree or decretal order shall not have been given, or, having been given, where a decree or decretal order shall not

Affidavits may be filed.

Issue may be joined by filing replication as at present.

(*a*) Vancouver *v.* Bliss, 11 Ves. 458; Howell *v.* George, 1 Madd. Rep. 1.

CHAP. XIII.

have been made thereon, issue shall be joined by filing a replication in the form or to the effect of the replication now in use in the court; and where a defendant shall not have been required to answer and shall not have answered the plaintiff's bill, he shall be considered to have traversed the case made by the bill.

Where a defendant is not required to answer and does not answer the bill, so that under the statute 15 & 16 Vict. c. 86, s. 26, he is to be considered as having traversed the case made by the bill, issue shall nevertheless be joined by filing a replication in the form and to the effect of the replication set forth in 17 Cons. Ord. r. 1.

The object of the above section of the statute seems to be to provide against the chance of the motion for a decretal order failing (*b*). It is not necessary to file a replication pending such motion (*c*).

The plaintiff may move for a decree notwithstanding he has filed a traversing note (*d*).

Dismissing bill for want of prosecution.

If the plaintiff be advised to file his replication to the defendant's answer, and omit to do so within the proper time, *i. e.* the four weeks lastly mentioned, the defendant is at liberty to serve him with a notice of motion to dismiss for want of prosecution, which fixes him with the costs of the application, and forces him to give an undertaking to speed the cause, *i. e.* to file his replication, which puts the cause completely at issue, without serving the subpœna to rejoin, as formerly was required for that purpose (17 Cons. Ord. r. 2).

Evidence on replication.

The evidence for the hearing where a replication has

(*b*) Manière *v.* Leicester, 2 Eq. Rep. 306; 23 Law Jour. 263; 18 Jur. 320; 2 Week. Rep. 327.

(*c*) Duffield *v.* Sturges, 9 Hare, Append. 87; 22 Law Jour. 288; 15 & 16 Vict. c. 86, s. 15.

(*d*) Manière *v.* Leicester, Kay, Append. 48; 18 Jur. 320; 5 De Gex, M. & G. 75; Jones *v.* Howell, 3 W. R. 559.

been filed is obtained by the respective parties usually either in the shape of affidavits, or, if a witness is reluctant, by his examination in private before an examiner, and it must all be filed within eight weeks; so that neither side need see the evidence of his opponent before the evidence is closed, and so cannot reply. Either side may, however, ask that the evidence in chief on certain issues may be taken *vivâ voce* at the hearing, when the witnesses will also be cross-examined and re-examined in court. If the evidence in chief be taken by affidavit or before an examiner, either side may give notice to cross-examine any of his opponent's witnesses, and such cross-examination and the re-examination must be at the hearing, unless for some exceptional cause leave to conduct the cross-examination of any witness before the examiner or a special examiner is given (see Chap. XV.).

Evidence on motion for a decree.

When a plaintiff has given notice of motion for a decree, he surrenders his claim to a further answer, although upon exceptions filed the answer has been held insufficient (*e*).

Before service of the notice of motion the plaintiff must file his affidavits in support of the motion for decree, and must set forth a list of the affidavits he intends to make use of at the foot of the notice (*f*).

The defendant must file his affidavits in support of his defence within fourteen days after service of the notice of motion, and deliver a list of them either to the plaintiff or his solicitor (*g*).

If upon a sufficient reason being shown a defendant is desirous of further time to file his affidavits, he may obtain an enlargement thereof by making a special application to the judge in chambers by summons.

(*e*) Boyse *v.* Cokell, 18 Jur. 770.
(*f*) Ord. xxxiii. 5.
(*g*) Ord. xxxiii. 6.

CHAP. XIII.

After the defendant has filed his affidavits, the plaintiff has seven days from the expiration of the fourteen days, or in case there has been an enlargement of the time, from the expiration of such enlarged time, within which he may file his affidavits in reply, which must be confined to matters strictly in reply (*h*). (And see further as to Cross-examination, *post.*)

Infants.

Where there happens to be an infant plaintiff the cause cannot be set down upon bill and answer; but the facts alleged in the answer must be put in issue and strictly proved (*i*). And it is the same in respect to an infant co-defendant, so far at least as his interest is concerned, unless the objections which he might take are waived by an arrangement among the solicitors on both sides (*k*). These rules, however, have no application where the answer is a full admission of the allegations of the bill.

Upon the death of a defendant, unless the suit is revived, it is irregular to file a replication to the answer of such defendant (*l*).

(*h*) Dan. Pr. 764; Ord. xxxvii. 17, 18.

(*i*) Legard *v.* Sheffield, 2 Atk. 377; Thurston *v.* Nutten, 3 P. W. 237, *n.*; Cowdell *v.* Tatlock, 3 V. & B. 19.

(*k*) Tillotson *v.* Hargreave, 3 Madd. 494; *vide* also Gresley's Evid., 2nd edit. 51.

(*l*) Deeks *v.* Stanhope, 2 W. R. 651; 23 L. T. 341.

CHAPTER XIV.

EVIDENCE.

Examination of witnesses.

THE matter being now at issue, the parties may proceed to the next step in the cause, *i. e.* that of entering into evidence for the purpose of substantiating the truth of the allegations adduced in the pleadings of either party. This is effected by each side obtaining the best evidence he is able, so far as it is material to support his case, which was formerly done by means of interrogatories drawn and signed by each party's counsel (*a*), for the examination of his witnesses, whose depositions were taken down in writing by an examiner at the Examiner's Office, in Rolls Yard. Parties answering to interrogatories as witnesses were previously sworn by the examiner; and it was the same with a peer when he was examined as a witness. A witness objecting to answer any interrogatory put to him did so by demurrer, which was taken down at the time by the examiner.

There are now four methods by which a party may sustain his case:—

1. By the evidence contained in the pleadings.
2. By evidence produced from oral examination.
3. By documentary evidence.
4. By evidence from affidavits.

1. *By Evidence contained in the Pleadings.*

By 1 Will. IV. c. 36, s. 14, as soon as an order shall have been pronounced by a court of equity for taking a

(*a*) Per Jeffreys, C., 29th April, 1687; Sand. Ord. 375.

bill *pro confesso*, such bill, or an examined copy thereof, shall be taken and read in any court of law or equity as evidence of the facts and matters and things therein contained, as though they had been admitted to be true by the answer of the defendant put in to such bill; and such bill so taken *pro confesso* shall be received and taken in evidence of such and the same facts, and on behalf of such and so many persons, as the answer of the defendant to the said bill could and might have been read and received in evidence of, in case such answer had been put in by the defendant thereto, and had admitted the same facts, matters and circumstances as in such bill stated and set forth. And in like manner every other bill of discovery, taken *pro confesso* under any of the provisions of the Act, shall or may be taken or read as evidence of the facts and matters and things therein contained to the extent aforesaid.

A plaintiff may read the defendant's answer in support of his case; and although the plaintiff may have filed his replication, he is still at liberty to make use of any admission contained in the defendant's answer (*b*). The defendant is also at liberty to read his answer in favour of his own case, which, as before observed, is taken to be true unless the plaintiff replies or gives notice of motion for a decree, in which case the defendant must support the statements in his answer by evidence. The plaintiff may read any passage in the answer he chooses, but in such an event he must read the whole of the passage; but he is not thereby precluded from adducing any evidence to disprove an allegation contained in such passage (*c*). If the passage is qualified by, although it does

(*b*) Vancouver *v.* Bliss, 11 Ves. 464; Dawson *v.* Ellis, 1 J. & W. 524.

(*c*) Price *v.* Lytton, 3 Russ. 206.

not refer to, a subsequent passage, the defendant is at liberty to read this latter passage (*d*).

We have already seen that the answer of one defendant cannot be read against a co-defendant except in an interpleader suit, or upon motion for decree and after notice, and that no admissions in an infant's answer will be binding on him. Nor is the joint answer of husband and wife to be taken as evidence against the wife (*e*), although their joint and several answer may be read as evidence against the wife in respect of her separate estate (*f*).

2. *By Evidence produced from Oral Examination.*

The method of obtaining evidence by written interrogatories, which were prepared by counsel, had long been objected to by reason of the uncertainty and privacy with which the examination was conducted; for it was neither certain what witnesses would be forthcoming, nor what answer he might give to any particular question. It was necessary therefore to frame the interrogatories in a manner best calculated to meet the necessity of the case and the contingencies which were thought most likely to arise. Whether the examination took place in London before the examiner, or in the country before a commissioner specially appointed for that purpose, each of them took down the answers in writing, and was bound by an oath not to disclose the evidence taken.* Neither the

(*d*) Rude *v.* Whitchurch, 3 Sim. 562.

(*e*) Elston *v.* Wood, 2 M. & K. 678.

(*f*) Callow *v.* Howle, 1 De Gex & Sm. 531; Clive *v.* Carew, 1 J. & H. 207; Stephens *v.* Heathcott, 8 W. R. 336; 6 Jur., N. S. 312; 29 L. J., Ch. 529; 36 Law Times, 112.

* A commission to examine witnesses was granted when they happened to reside in the country, *i. e.* beyond twenty miles from

parties to the suit nor their agents were allowed to be present, and lest one particular witness (who if examined orally and publicly would have been found sufficient) should have omitted to give full evidence of the material facts, arising from the uncertainty of the method, several other witnesses were often produced to supply the deficiency by proving the same facts. It is true the witnesses might be subjected to a cross-examination ; but if the examination in chief was so uncertain, who would risk drawing the bow at such a venture when it was uncertain what even the examination in chief might be ? except indeed where the witness was known to be friendly to the cross-examining party, and had previously communicated facts to be the subject of such cross-examination. The Chancery Commissioners, therefore, after a careful consideration of the subject, recommended, among other improvements, that the then existing system of examining witnesses upon written interrogatories should be abolished, and an entire change in the mode of taking evidence in chancery adopted (Ch. Com. Rep. pp. 7—40). Accordingly, the 28th sect. of 15 & 16 Vict. c. 86, abolishes the then existing practice, although witnesses to be examined *de bene esse* must still be examined *vivâ voce*, unless under particular circumstances (*g*). And sect. 29 provided that when any suit commenced by bill should be at issue (that is, where replication has been filed), the plaintiff should within such time thereafter as should be prescribed by the lord chancellor after issue joined therein, give notice to the defendant that he desired that the evidence to be adduced in the cause should be taken orally or upon affidavit, as the case might be.

London. If the witnesses lived within that distance, their examination took place before one of the examiners in London, which was technically called "An Examination in Court."

(*g*) Cook *v.* Hall, 20 Law Times, 152.

The 31st Order, 7th August, 1852, made in pursuance of the above section, prescribed the number of days' notice to be given.

This Order however was but of short duration, for by the 2nd Order, 13th January, 1855, the 31st, 32nd and 33rd General Orders of 7th August, 1852, were abrogated and discharged. The 4th of those Orders (13th January, 1855) renders such notice unnecessary. This became embodied in the 19th Cons. Ord. r. 3, which last-mentioned Order became abrogated in its turn by the more recent Order, 5th February, 1861.

All witnesses to be examined orally under the provisions of the Act shall be examined by or before one of the examiners of the court, or by or before an examiner to be specially appointed by the court (sect. 31).

Depositions to be taken down in writing and read over to witness, who shall sign the same in presence of the parties; but if he refuse to sign, examiner may, and state any special matter he may think fit.

The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend: provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the court as he shall think fit: provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions; and the court shall have

CHAP. XIV.

power to deal with the costs of immaterial or irrelevant depositions as may be just (sect. 32).

If parties refuse to be sworn or to answer any lawful questions, the same course to be pursued as is now adopted.

If any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said court upon written interrogatories, and refusing to be sworn, or to answer some lawful question: provided always, that if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the record office of the said court, to be there filed; and the validity of such demurrer or objection shall be decided by the court; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the court (sect. 33).

Proviso as to witness demurring to questions.

Original depositions to be transmitted to the Record Office, and filed.

When the examination of witnesses before any examiner shall have been concluded, the original depositions, authenticated by the signature of such examiner, shall be transmitted by him to the record office of the said court, to be there filed; and any party to the suit may have a copy thereof, or of any part or portion thereof, upon payment for the same in such manner as shall be provided by any general order of the lord chancellor in that behalf (sect. 34).

Commission for examination of witnesses dispensed with, and examiner empowered to

It shall not be necessary to sue out any commission for the examination of any witnesses within the jurisdiction of the said court; and any examiner appointed by any order of the court shall have the like power of administering oaths as commissioners now have under

commissions issued by the court for the examination of witnesses (sect. 35) (*h*).

administer oaths.

Notwithstanding that the plaintiff or the defendant in any suit in the said court may have elected that the evidence in the cause should be taken orally, affidavits by particular witnesses, or affidavits as to particular facts or circumstances, may, by consent, or by leave of the court obtained upon notice, be used on the hearing of any cause; and such consent, with the approbation of the court, may be given by or on the part of married women or infants or other persons under disability (sect. 36).

Affidavits as to particular facts, etc. may be used.

Every affidavit to be used in the said court shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject (sect. 37).

Affidavits to be divided into paragraphs, numbered.

The evidence on both sides in any suit in the said court, whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined as shall in that behalf be prescribed by any general order of the lord chancellor, but with power to the court to enlarge the same as it may see fit; and after the time fixed for closing the evidence, no further evidence, whether oral or by affidavit, shall be receivable without special leave of the court previously obtained for that purpose: provided always, that any witness who has made an affidavit filed by any party to a cause shall be subject to oral cross-examination within such time after the time fixed for closing the evidence as shall be prescribed in that behalf by any order of the lord chancellor, by or before an examiner, in the same manner as if the evidence given by him in his affidavit had been given by him orally before the examiner, and after such cross-

Evidence, oral or by affidavit, on both sides, to be closed within time prescribed by general order.

Witnesses by affidavit to be subject to oral cross-examination, and after wards to re-examination.

(*h*) See Hextall *v.* Cheatle, 20 Law Times, 129.

CHAP. XIV.

Witnesses bound to attend.

examination may be re-examined orally by or on the part of the party by whom such affidavit was filed; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of *subpœna ad testificandum* before such examiner; and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness to be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the court shall think fit otherwise to direct (sect. 38).

As to expenses attending cross-examinations, etc.

The time for giving notice to the opposite side to produce a witness under this section is fourteen days: *vide* Ord. 5th February, 1861, r. 19. A party having given notice of his intention to cross-examine a party to the suit and thinks fit to abandon that course must first of all pay the costs occasioned thereby (*i*).

As for the proper time for the court to exercise its discretion under sect. 39, see Morg. Ord. p. 192, n. (*o*), and the cases there referred to.

This section is equivalent to the former practice of passing publication.

Court may require the production and oral examination before itself of any witness, etc., and determine payment of the costs.

Upon the hearing of any cause depending in the said court, the court, if it shall see fit to do so, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party, to be paid by such of the parties to the suit or in such manner as it may think fit (sect. 39) (*k*).

(*i*) Davey *v.* Durrant, 24 Beav. 411.

(*k*) Smith *v.* Edwards, 20 Law Times, 60; Cable *v.* Cooper, ibid.; Wilkinson *v.* Stringer, ibid. p. 76.

Upon this section of the Act the plaintiff in a suit (*l*) having applied to the court for liberty to cross-examine one of the defendant's witnesses who had not been called by the defendant himself, the V.-C. Stuart observed that such an application was quite new; for although the Chancery Practice Amendment Act was certainly very wide in its terms and would seem to apply to anyone who had merely made an affidavit in the cause, yet the terms of the Act must be construed with reference to the objects of it and the requirements of justice, and accordingly refused the application with costs.

Any party in a cause may by subpœna require attendance of any witness before an examiner.

Any party in any cause or matter depending in the said court may, by a writ of *subpœna ad testificandum* or *duces tecum*, require the attendance of any witness before an examiner of the said court, or before an examiner specially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence upon any motion, petition, or other proceeding before the court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used, or which shall be used on any motion, petition, or other proceeding before the court, shall be bound, on being served with such writ, to attend before an examiner for the purpose of being cross-examined: provided always, that the court shall always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case (sect. 40).

This is intended to be an improvement upon the old practice, as formerly there were no means of producing before the court the testimony of an unwilling witness; and lest it should be used for purposes

(*l*) Fielding *v.* Goschen, Nov. 18, 1869, MS.

of delay, the court may exercise its discretion as to whether it will make use of such evidence: *vide* Kennedy's Code, 157 *n.* And according to Orders 36 and 37, 7th August, 1852, notice of the intention to cross-examine must be given forty-eight hours previously to the opposite party. These orders, however, becoming merged in 19 Cons. Ord. r. 9, were abrogated by the more recent Orders, 5th February, 1861.

Evidence subsequent to hearing to be taken the same as prior to hearing.

In cases where it shall be necessary for any party to any cause depending in the said court to go into evidence subsequently to the hearing of such cause, such evidence shall be taken as nearly as may be in the manner hereinbefore provided with reference to the taking of evidence with a view to such hearing (sect. 41).

Cause at issue by replication.

When the cause is at issue, by filing the replication, each defendant may, without any rule or order, proceed to examine his witnesses; and the plaintiff may do the same, so soon as notice of the replication being filed had been duly served on all the defendants who have answered or pleaded, or against whom a traversing note has been filed.

When the defendant has answered, the plaintiff shall carefully consider the answer, and if he finds that upon the answer alone, without further proof, there is sufficient for a final decree, he shall proceed upon it alone and not go into evidence. Or, if it is needful to prove a particular point, he shall go into evidence of other points not requiring proof. If he depart from this course, he will render himself liable to pay the costs of the unnecessary evidence (19 Cons. Ord. r. 1) (*m*).

The traversing note became first known in practice by virtue of the 21st Order, 26th August, 1841, which

(*m*) Littlewood *v.* Collins, 1 N. R. 457.

directs that, where the defendant makes default in pleading, answering, or demurring, the plaintiff shall be at liberty to file a note at the six clerks' office (now the clerk of the records and writs, 3rd Order, 26th October, 1842), to the following effect:—"The plaintiff intends to proceed with his cause, as if the defendant had filed an answer traversing the case made by the bill, and the plaintiff had replied to such answer, and served a subpœna to rejoin."

The form now is, "the plaintiff in this cause hereby joins issue with the defendant C. D." [*all the defendants who have answered or pleaded, or against whom a traversing note has been filed, or who have not been required to answer and have not answered the bill*], "and will hear the cause on bill and answer against the defendant E. F." [*all the defendants against whom the cause is to be heard on bill and answer*], "and on the order to take the bill as confessed against the defendant G. H." [*as the case may be*] Cons. Ord. 17.

The lord chancellor (Cottenham), alluding to the 61st of the Orders, 8th May, 1845, conceived that there was an omitted case in the Orders which authorize service abroad of the subpœna only. Thus, where a defendant was living in America, out of the jurisdiction, and had been served with an order to appear and answer,—and, on his failure to do so, an appearance was entered for him by the plaintiff, the court refused to direct a copy of a traversing note filed by the plaintiff to be served out of the jurisdiction under Order 61, as that Order applies to cases only where the defendant has appeared by solicitor, or in person, and there was no other general order authorizing the court to do so (*n*).

(*n*) 8 Law Times, 269; Anderson *v.* Stather, 16 L. J. 152; 11 Jur. 96.

It is a general rule that before a traversing note can be filed the defendant must either have appeared or had an appearance entered for him (*o*).

Where notice has been given of the filing of an answer a traversing note filed after such notice will be ordered to be taken off the file (*p*).

A traversing note does not operate in the same manner as an answer upon oath, as the court has not the oath of the defendant to set against the testimony brought forward by the plaintiff (*q*).

After the filing a traversing note the cause may be heard on motion for a decree (*r*).

If the defendant make default in appearing at the hearing, the plaintiff is not entitled as of course to take such a decree as he can abide by; but he must go through his case and take such a decree as to the court may appear just (*s*).

If defendant has not been required to answer and has not answered he is taken to have traversed the case made by the bill, and a replication should be filed if the cause is to be heard on replication (17 Cons. Ord. r. 1); if on motion for a decree a traversing note and not a replication should be filed (*t*). The orders as to a traversing note do not apply to infants (*u*).

As to a party to the suit being a witness.

Generally, a party interested in the suit was incompetent to be examined as a witness: thus a defendant could not have examined the plaintiff, unless by consent on an

(*o*) Treweck *v.* Turner, 1 Y. & C. C. C. 112; Moss *v.* Buckley, 2 Ph. 628; Hoslock *v.* Wilson, 12 Beav. 545.

(*p*) Rigby *v.* Rigby, 6 Bea. 265.

(*q*) Martin *v.* Norman, 2 Hare, 596.

(*r*) Manière *v.* Leicester, 22 L. J. 341; 23 L. J. 263.

(*s*) Evans *v.* Williams, 6 Beav. 118.

(*t*) Duffield *v.* Sturgis, 21 L. J. 205.

(*u*) Emery *v.* Newson, 10 Sim. 564.

order made upon motion, saving just exceptions; neither could one plaintiff examine another co-plaintiff as a witness. But where there was a suggestion that the party had no interest, one defendant might have been examined on behalf of a co-defendant, or by the plaintiff, as a witness. An interested witness might have been examined, provided he first exhibited a release.

It sometimes occurs that a party against whom a witness is about to be examined is not satisfied as touching the testimony of such witness: this objection may arise either in respect of his credibility or competency.

Competency and credibility of witnesses.

The difference between the *competency* and the *credibility* of a witness appears to be this—that a man of the most infamous and depraved character, although not credible, may, nevertheless, be a competent witness. For it was the *infamia facti* which alone disqualified a witness in regard to his credibility, and prevented his evidence being admitted upon oath; on the other hand, it was only the *infamia juris* which was deemed capable of destroying the competency of a witness (*x*).

The grounds of objection to the competency of a witness were formerly:—

1. For want of reason or understanding, as in the case of lunatics, idiots, and children of so tender an age as not to understand the nature of an oath.

2. For defect of religious principles, as where persons do not profess any such religion as will be binding upon their conscience to speak the truth (*y*).

3. That disqualification which, until lately, arose from the conviction of certain crimes, such as forgery, perjury, subornation of perjury, &c. (*z*); but, by the 6 & 7 Vict. c. 85, no witness is to be excluded from giving evidence by incapacity, notwithstanding such person offered as a

(*x*) Phil. Ev. 28. (*y*) Ibid. 22. (*z*) Ibid. 29.

witness may have been previously convicted of any crime or offence, or has any interest in the subject-matter in question.

4. A fourth objection might have arisen from interest, as in the case of a co-plaintiff, who could not be examined on behalf of another plaintiff, or on behalf of a defendant (*a*).

Although by an order for that purpose obtained upon the suggestion that the party to be examined was not interested, a plaintiff might examine a defendant, and a defendant a co-defendant: it is however provided by the last-mentioned Act, section 1:—"That in courts of equity any defendant to any cause pending in any such court may be examined as a witness on behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness."

By the 14 & 15 Vict. c. 99, ss. 2 and 3, it is provided, that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding, in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the parties thereto and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as thereinafter excepted, be competent and compellable to give evidence either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any parties to the said suit, action, or other proceeding.

(*a*) Farreday *v.* Wrightwick, 4 Russ. 114.

But (sect. 3) nothing therein contained shall render any person compellable to answer any question tending to criminate himself or herself.

The plaintiff who examines a defendant as a witness is not, as formerly he was, prejudiced in his right to take a decree against him (*b*).

But notwithstanding these enactments, it has been held that the Act merely removed the objection arising from the fact of the witness being a party to the cause, and did not affect the case of a married woman, who might happen to be a party to the suit, and who therefore could not give evidence for or against her husband (*c*).

By the 16 & 17 Vict. c. 83, s. 1, it is enacted, that on the trial of any issue joined or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence; the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted or opposed or defended, shall, except as thereinafter excepted, be competent and compellable to give evidence either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

It is also enacted that nothing therein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding or in any proceeding instituted in consequence of adultery (sect. 2). No husband shall be compellable to

(*b*) Harford *v.* Rees, 9 Hare, Append. 70; 20 L. J. 232; Week. Rep. 144.

(*c*) Alcock *v.* Alcock, 5 De G. & Sm. 671; 21 L. J. 856; 16 Jur. 653; M'Neille *v.* Acton, 17 Jur. 661.

disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage (sect. 3).

By an ancient order, before a party was allowed to examine a witness to invalidate the credit of any other witness, he must obtain a special order of the court, upon exceptions first put in writing and filed with the examiner (*d*), which order might be obtained before the time for closing evidence had expired (*e*); the court attending with great caution to an application for permitting any witness to be examined after the time for closing evidence had expired (*f*).*

After time for closing evidence, and before hearing, articles might be exhibited as to credit.

Formerly when publication had passed, the court would, at any time before the hearing, give a party leave to exhibit articles to *discredit* a witness who had been cross-examined, by general interrogatories as to credit, and when the interrogatories went to such particular facts only as were not material to what was in issue in the cause (*g*); otherwise the depositions might have been suppressed: they therefore could not be too general, in reference to any matter at issue in the cause. The practice of passing publication has given place to another technical form of practice under the 38th section, 15 & 16 Vict. c. 86, now known as "closing evidence;" and it

(*d*) Bea. Ord. 187.

(*e*) White *v.* Fussell, 19 Ves. 127.

(*f*) Purcell *v.* M'Namara, 8 Ves. 324.

* Sir Samuel Romilly, in the case of Purcell *v.* M'Namara, last cited, refers to a somewhat different course, namely, to exhibit interrogatories, and not to file exceptions; which he said was adopted in the case of Paris *v.* Paris, about two years previously, before Lord Alvanley at the Rolls, and that Lord Hardwicke, in Callaghan *v.* Rochfort, 3 Atk. 643, seems to have understood the rule in the same way.

(*g*) Purcell *v.* M'Namara, 8 Ves. 324.

is provided that after the time fixed for closing the evidence no further evidence of any kind shall be receivable without special leave of the court previously obtained. And after the time has expired, special circumstances are necessary to obtain an enlargement of the time (*h*). The court still has, under sect. 28, power to direct the examination of a witness upon interrogatories before the examiner.

The principal question resolved itself into this—namely, whether the witness is to be believed upon his oath, since a contrary practice would let in all sorts of slander (*i*). And although Lord Hardwicke, in Gill *v.* Watson (*k*), whilst he admitted the rule to exist in law, yet stated that the practice might be different in equity; for at law a witness cannot be prepared to defend every particular action of his life, but upon an examination in this court, he has time enough to recollect, and therefore be able to answer any particular charge.

In fact, that great judge seemed to doubt whether the difference really did exist.

Paris *v.* Paris.

In Paris *v.* Paris, heard at the Rolls Court in 1801, and referred to in Purcell *v.* M'Namara, it was determined that if the inquiries go to particular facts, either in the articles themselves or in the affidavits in support of them, or embodied in the subsequent interrogatories, they may be suppressed as scandalous (*l*).*

(*h*) Thompson *v.* Partridge, 4 De Gex, M. & G. 794; 17 Jur. 1108.

(*i*) Anon., 3 Ves. & B. 93.

(*k*) 3 Atk. 522.

(*l*) Carlos *v.* Brooke, 10 Ves. 49.

* Lord Chief Justice Pratt, in Layer's case, says, "The reason why particular facts are not to be given in evidence to impeach the character of the witness is, that, if it were permitted, it would be impossible for that witness, having no notice of what will be sworn

CHAP. XIV.

Lord Clarendon's Orders, 22nd May, 1661.

In one of Lord Clarendon's Orders, 22nd May, 1661, "The examiner shall not examine any witness to invalidate the credit of any other witnesses but by special order of the court; which is sparingly to be granted, and upon exceptions first put into writing and filed with the examiner, without fee, and notice thereof given to the adverse party, or his clerk (attorney), together with a true copy of the said exceptions, at the charge of the party so examining" (*m*).

Exception to the credit of a witness by order, upon special application.

And whether it be before or after the expiration of the time for closing evidence, an exception to the credit of witnesses can only be by order, upon special application with notice. And, therefore, under the above Order of Lord Clarendon, evidence taken to the credit of a witness upon the examination in chief will be suppressed as impertinent (*n*). But after a party has exhibited articles to discredit a witness, it will be too late for him to move that a deposition may be suppressed for irregularity (*o*).

These rules would in principle probably be followed now. Indeed sect. 28 only abolishes the old method of examining witnesses, and in so far as such method, &c. is inconsistent with the new rules.

Method of impeaching credit of witness.

The usual method of impeaching the credit of a witness at law was by producing other persons, who are called upon to impeach it, to swear whether they have the means of knowing his general character, and whether, with such knowledge, they would believe him upon his oath. But by the 17 & 18 Vict. c. 125, called the Common Law

PARTY'S OWN WITNESS.

against him, to come prepared to give an answer to it; and thus the character of witnesses may be vilified, without having any opportunity of being vindicated."—6 State Tr. 198—316; S. C., Howell's State Tr. 246—286.

(*m*) Bea. Ord. 188; Sand. Ord. 302. *Vide* also Ord. 228.

(*n*) Mill *v.* Mill, 12 Ves. 406.

(*o*) Malone *v.* Morris, 2 Moll. 324.

Procedure Act, it is enacted, that a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove *adverse*, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement (sect. 22). This section has been held to apply also to proceedings in chancery and to examinations taken before an examiner (*p*) (*vide* also the three following sections). By sect. 25 (which also applies to all courts) a witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and if he denies it, the fact may be proved by a certificate from the proper officer and proof of identity. The other mode of testing the credit of a witness is, by putting questions to him, and after he has been cross-examined, to get other witnesses to swear that such facts as he has alleged are not true (*q*).

OPPONENT'S WITNESS.

Where an examination is allowed, to impeach the credit of a witness, the adversary has a right to rebut the testimony, and to support his credit by counter-evidence; thus, in Ambrosio *v.* Francia, referred to in 8 Ves. 364, witnesses appear to have been examined by both parties, —the court directing that the plaintiff should be at liberty

COUNTER-EVIDENCE OF WITNESS.

(*p*) Buckley *v.* Cooke, 3 Week. Rep. 33; 24 L. J. 24; 1 K. & J. 29. Leave to produce counter-evidence must be obtained on motion before the hearing from the judge, who (and not the examiner) is to determine whether the witness is adverse, that is, hostile. And see Wright *v.* Wilkin, 4 Jur., N. S. 804.

(*q*) 2 Phil. on Evid. 432. Per Sir S. Romilly, in 8 Ves. 324.

CHAP. XIV.

to examine as to the fact upon which witness had deposed, and also to the competency and credit of the witness (*r*). And, in a case (*s*) at the Rolls, Lord Langdale stated that the practice in proceeding to discredit a witness was to exhibit articles first, and afterwards apply for a commission; although a motion to grant a commission, and for liberty to exhibit articles at the same time, may be granted.*

Articles as to *competency* not allowed after expiration of time for closing evidence.

But a party is not at liberty to exhibit articles against the *competency* of a witness after the time for closing evidence expires; for this might have been objected to and inquired into pending the examination, unless the fact of such incompetency did not come to his knowledge until after the expiration of that time, and then he may apply, not by exhibiting articles but by motion for leave to examine to that matter upon a foundation of ignorance at the time of the examination (*t*).

Articles impeaching the credibility of a witness, if in a town cause, are filed with the examiner, and, if in a country cause, with one of the clerks of the records and writs (*u*); and they are annexed to the depositions in the office (*x*).

The rules of evidence in a court of equity, as to witnesses, are exactly the same as at law (*y*).†

(*r*) Phil. on Evid., citing Luttrell *v.* Reynell, 1 Mod. 282.

(*s*) Harvey *v.* Mount, 3 Law Times, 218.

* It will be borne in mind that the commission to examine witnesses within the jurisdiction is abolished. *Vide* 15 & 16 Vict. c. 86, ss. 21 and 35.

(*t*) Callaghan *v.* Rochfort, 3 Atk. 643.

(*u*) White *v.* Fussell, *supra*. *Vide* 3rd Ord., 26th October, 1842, 1 Cons. Ord. r. 35.

(*x*) Hinde's Ch. Prac. 274.

(*y*) Henley *v.* Phillips, 2 Atk. 48.

† "Although in general the rules of evidence in equity differ not from those used at law, yet in particular cases, such as those of

When witnesses are unwilling to attend, *subpœna ad testificandum* necessary.

When the witnesses are unwilling or refuse to attend at the examination, they must be served with a *subpœna ad testificandum;* and in case any of the witnesses has a deed, bond, paper, or any writing or instrument which the party considers material to the question, and the production of which is necessary, such witness ought to be served with a *subpœna duces tecum:* and if the witness, on being served with a subpœna, do not attend at the time and place appointed for his examination, the party requiring his attendance, upon affidavit of such service and notice, and non-attendance of the witness in pursuance thereof, may move the court that he attend at his own expense in four days, or be committed. A warrant then issues from the lord chancellor, on which the witness is taken and committed to the Queen's Prison. A witness will be liable also to stand committed, if he attend, but refuse to be sworn or examined, provided the interrogatories are not such as tend to draw from him evidence that would render him liable to a criminal prosecution; in which case, or in any other where he objects to answer an interrogatory, he must do so in the form of a demurrer, which is set down for hearing among the general demurrers (*z*), and is taken down by the examiner, or, if out of the jurisdiction, by commissioners, from the mouth of the witness: and here it may be noticed that, in the case referred to, Lord Eldon remarked, that it is by an abuse of this term the witness's objection to answer is called *a demurrer* in the popular sense.*

fraud or trust, the courts of equity use large discretion."—Gresley's Evid. in Eq. 328, n. (*a*). Man *v.* Ward, 2 Atk. 223; Lupton *v.* White, 15 Ves. 443.

(*z*) Parkhurst *v.* Sowton, 2 Swans. 194.

* Hence, among the illiterate, who are at all times captivated by fine expressions, we frequently hear a person tendering his refusal or objection to any proposal in some such manner as the fol-

CHAP. XIV.

When a party demurs to answer a criminal charge, his refusal to answer it is not to be taken as an inference of the truth of the charge contained in the bill, or that the defendant thereby admits the fact to be true (*a*).

When interrogatories are leading.

When the interrogatories are leading, or are irregular, they will be ordered to be suppressed; and where the examiner has fallen into an error in taking evidence, the court will order it to be amended, and will also order the witness to be re-sworn after the time for closing evidence has passed (*b*).

Where facts are doubtful.

In most cases, where the facts upon the depositions in equity are doubtful, the court will sometimes allow the bill to be retained upon the file for a year; this is done to allow parties to try the truth of such facts by an action at law (*c*). All affidavits of witnesses are now to be taken and expressed in the first person of the deponent (18 Cons. Ord. r. 1).

3. *By Documentary Evidence.*

Documents and writings to be proved in a suit are technically called *exhibits;* the mode of proof in reference to them is either by *admission* or by *witnesses.*

Exhibit; to what species of examination applicable.

The term *exhibit* is more usually confined to that examination, wherein certain documents are, for the sake of saving expense and trouble, allowed to be proved *vivâ voce* at the hearing. This is the usual course when there exists no necessity for a cross-examination by the other party, or in cases where the cause is set down upon bill and answer only, or where either party has omitted to

lowing:—"Oh, I demur to this;" "I do assuredly put in my demurrer to that;" or, "I shall certainly demur to such a measure," &c.

(*a*) Lloyd *v.* Passingham, 16 Ves. 69.

(*b*) 2 Eq. Ca. Ab. 60; Lloyd *v.* Waite, V.-C. of England's C., August 3, 1840.

(*c*) Smith *v.* Earl of Effingham, 10 Law Times, 1.

prove some material document until the time for closing evidence has expired. This convenient manner of admitting documents to proof is only obtained by order fully describing those which are thus intended to be used, and a copy of the order must be left with the solicitor of the adverse party two days before the hearing of the cause. As a matter of course, this kind of examination is limited to a few simple questions, such as the custody and identity of an ancient document produced by a librarian or registrar, the accuracy of an office copy produced by the proper officer, the execution of a deed, where the party examined was the witness who attested the deed,—which mode of proof, however, is not allowed where the attesting witness is alleged to be dead. The handwriting of a letter, or receipt, or promissory note, may be thus proved (*d*); but the same summary mode of proof will not, for the reasons hereafter mentioned, be allowed to prove the validity of a will, because a searching examination might arise as to the sanity of the testator, though under the present practice a will has been allowed to be proved at the hearing, with liberty to the heir to cross-examine the witnesses (*e*).

The foregoing *vivâ voce* examinations are called proving by *admission*. A much more convenient mode of proof by admission is by means of an affidavit which it seems, notwithstanding the alterations in practice under the Consolidated Orders, may still be used (*f*).

The regular and usual method, however, of proving exhibits not admitted is by affidavit or before the examiner, to enable the other party to avail himself of a cross-examination.

In general, maps, plans, drawings, models, and other

(*d*) Gresley's Evid. 188.
(*e*) Chichester *v.* Chichester, 24 Beav. 289.
(*f*) Dan. 816, n. (*o*).

things of a like nature, exhibited to the court by way of evidence, and not admitted by the other side, are identified and proved as exhibits by the evidence or by affidavits of parties (*g*).

The proof of documents is now often rendered unnecessary by reason of 21 & 22 Vict. c. 27, s. 7. In any case in which all parties to a suit are competent to make admissions, any party may call on any other by notice to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, the cost of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless the court shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the taxing master, a saving of expense.

It was formerly the rule, that a deed forty years old might be produced in evidence, without any proof of its due execution; and the reason assigned was, that the witness could not be supposed to live above forty years, —forty years being a sufficient proof of a prescription: besides, the average age of man is no more than sixty years, and he being supposed to be twenty years, before he is of age sufficient to understand the general forms of contracting, it follows that, after forty years, the witness must be regarded as dead, and therefore, since no person living could be presumed to be coeval with such deeds, they might be offered in evidence without proof. Thus reasoned our legal progenitors. This period, however, is now reduced to *thirty* years; at the expiration of which a deed or any other document is said to prove itself (*h*). Thus, a will thirty years old, produced from the proper

After thirty years a deed or will proves itself.

(*g*) Gresley's Evid. 172, n. (*f*).

(*h*) Gilb. Evid. 103.

custody, will prove itself. Which period of limitation is to be computed from the date of the will, and not from the testator's death, and is calculated at the time of its production (*i*).

To prove a will, sanity of testator to be proved.

When a suit is instituted for the purpose of proving a *will* of realty, the sanity of the testator must be proved, because the will is supposed to be made when the testator is *in extremis*, although not requisite when to establish a *deed* of *trust* for payment of debts, for then the sanity is presumed (*k*).*

Hindson *v.* Kersey.

In the case of Hindson *v.* Kersey (*l*), Pratt, Lord Chief Justice of the Common Pleas (afterwards Lord Camden), referring to the Statute of Frauds, and the distinction between the attestation of a will and of any other instrument, makes the following observations:—"And that the statute had a main view to the quality of the witnesses will appear from this consideration, namely, that a will† is the only instrument in it required to be attested by subscribing witnesses at the time of execution. It was enough for leases and all other conveyances, marriage agreements, declarations, and assignments of trust, to be in writing. These were all transactions of health, and protected by valuable considerations and antecedent treaties. The power of a court of equity was fully sufficient to meet with every fraud that could be practised in these cases, after the contract was reduced into writing. But a will was a voluntary disposition, executed suddenly in the last sickness, oftentimes almost in the article of death.

(*i*) Man *v.* Ricketts, 7 Beav. 93.

(*k*) Harris *v.* Ingleden, 3 P. Wms. 93.

* See *ante*, pp. 173 and 271, as to when and how a will can be established in equity.

(*l*) *Vide* 4 Burn's Eccles. Law, 89.

† It will be remembered that his lordship here speaks of a devise of real estates only, and, under the former requirements, of a devise of realty in regard to attestation.

CHAP. XIV.

And the only question that can be asked in this case is, Was the testator in his senses when he made it? and, consequently, the time of execution is the critical minute that requires guard and protection. Here you see why witnesses are called in so emphatically. What fraud are they to prevent? Even that fraud so commonly practised upon dying men, whose hands have survived their heads; who have still strength enough to write a name or make a mark, though the capacity of disposing is dead. What is the condition of such an object in the power of a few who are suffered to attend him, wheedled or teased into submission for the sake of a little ease, put to the laborious task of recollecting the full estate of all his affairs, and to weigh the just merits and demerits of those who belong to him, by remembering all and forgetting none? . . . What shall then secure the testator, at this important moment, from imposition? What shall protect the heir-at-law, and give the world a satisfactory evidence that he was sane? The statute speaks of credible witnesses. What is their employment? I say, to inspect and judge of the testator's sanity before they attest. If he is not capable, the witnesses ought to remonstrate and refuse their attestation. In all other cases the witnesses are passive, here they are active,—and, in truth, the principal parties to the transaction: the testator is entrusted to their care. Sanity is the great fact the witness is to speak of when he comes to prove the attestation; and that is the true reason why a will can never be proved as an exhibit *vivâ voce* in chancery, though a deed may; for there must be liberty to cross-examine to this fact of sanity (*m*). From the same consideration it is become the invariable practice of that court never to establish a will unless all the witnesses are

(*m*) But see *ante*, pp. 173 and 271, as to the present practice.

examined; because the heir has a right to proof of sanity from every one of them whom the statute has placed about his ancestor."

Witnesses to a will, the witnesses of the court.

These witnesses must, upon an issue at law, be examined, for they are not the witnesses of the one party or the other, but of the court; unless in cases of necessity, as death, insanity, or absence abroad, or the heir waives his right (*n*).

Issue *devisavit vel non.*

Notwithstanding the will may have been clearly proved upon interrogatories, the heir-at-law is still entitled to an issue *devisavit vel non* (*o*), unless by acquiescence or misconduct he has precluded himself (*p*).

But where the will requires to be proved for certain purposes only, such proof as will satisfy the court will be sufficient (*q*).

Probate generally sufficient.

Probate of a will in her Majesty's Court of Probate is sufficient as far as it goes: further proof, if necessary, may be proceeded on in a court of equity (*r*). This court requires the judgment of the Court of Probate that an instrument is testamentary, but is not always satisfied with the proof in that court, but requires the witnesses to be examined again (*s*). A will was never allowed to be proved before the master for the purpose of establishing it (*t*).

(*n*) Bootle *v.* Blundell, 19 Ves. 494—500; S. C., Coop. 136; 1 Meriv. 193.

(*o*) Pemberton *v.* Pemberton, 11 Ves. 53; 1 Wilson, 216.

(*p*) Bootle *v.* Blundell, *ante;* Man *v.* Ricketts, 7 Beav. 93. See *ante*, pp. 173, 174, and 271, 272, as to trial of the issue before the court itself or at law.

(*q*) Wood *v.* Stane, 8 Price, 613.

(*r*) Colman *v.* Sarrell, 1 Ves. jun. 54.

(*s*) Rich *v.* Cockell, 9 Ves. 376. See *ante*, pp. 173, 174, 271, 272. Probate is conclusive even of a will of realty, if proved in solemn form, the heir being cited. 20 & 21 Vict. c. 77, ss. 61—64.

(*t*) Lichmere *v.* Brazier, 2 J. & W. 289.

Signature of witness under examination necessary.

The witness must sign his examination, otherwise it is not complete ; and if he die between his examination and signing the same, his evidence cannot be made use of (*u*).

A peer answers upon his honour, but testifies upon oath.

Although a peer is allowed, by virtue of his rank, to answer upon his attestation of honour, yet, in giving his evidence as a witness, he must do so upon oath. This rule is applicable, as well to affidavits and examinations before the chief clerk, as to those before the examiner (*x*).

Foreign reigning prince, suing in Chancery, submits thereby to its jurisdiction.

Generally speaking, a sovereign prince, whilst resident in the dominions of another, is exempt from the jurisdiction of the court there ; nevertheless, if he sue another person in our courts of equity, he thereby submits to the jurisdiction, and a cross bill may be filed against him, which he must answer upon oath. But the circumstance of his filing a bill in Chancery against one person does not render him liable to be sued by another person for a distinct and independent matter (*y*).

Mode of proof where deed impeached on ground of fraud.

Although, according to the ordinary rules of the court, the execution of deeds, or the handwriting of letters and other documents, are allowed to be proved *vivâ voce* or by affidavit filed after the evidence closed, yet where, by the defendant's answer, the validity of a deed is impeached upon an alleged fraud, in this case the plaintiff must prove his deed in the regular way, in order that the defendant may have an opportunity of cross-examining the witnesses touching the fraud in question (*z*). And if the *validity* only, and not the execution of a deed, is questioned in a suit, it may be proved *vivâ voce* at the hearing ; but not if it relate to the execution of the deed (*a*).

(*u*) Copeland *v.* Stanton, 1 P. Wms. 413.
(*x*) Dan. Ch. Prac. by Headlam, 865.
(*y*) Duke of Brunswick *v.* King of Hanover, 6 Beav. 1.
(*z*) Maber *v.* Hobbs, 1 You. 583.
(*a*) Attorney-General *v.* Pearson, 7 Sim. 309; Attorney-General *v.* Shaw, ibid.

4. *By Evidence from Affidavits.*

We have seen that where there was a mere exhibit, or nothing but the handwriting of a party, or the formal execution of a deed was required to be proved, it might have been adduced *vivâ voce* at the hearing, and only at the hearing of the cause; for whenever the matter was brought before the court upon an interlocutory application, such as a motion for an injunction or a receiver, which, perhaps, might involve matters of the utmost importance to the parties concerned, the court not only proceeded upon affidavit evidence, but it possessed no other and no means of enforcing the production of any other evidence. The Chancery Commissioners, therefore, could not see upon what principle any other evidence, required by the court, should necessarily differ, according as the occasion is or is not the formal hearing of a cause; and having observed upon the different kinds of evidence then in use, and that their objections to an affidavit was, that the language was not that of the witness, but merely the language of the solicitor, or rather his assent on oath to the statement prepared by the solicitor, and that he is not seen nor liable to cross-examination, they proposed that the parties should be entitled to have the evidence taken in the most satisfactory way, and among other improvements, that affidavit evidence should in general be admissible (*b*)—that affidavits may, upon all interlocutory applications, be read against the answer, which should be regarded in such cases as an affidavit only.

Any witness having made an affidavit filed by any party to a cause shall be subject to oral cross-examination, within such time after the time fixed for closing the evidence as shall be prescribed by the lord chancellor, by or before an examiner, in the same manner as if the evi-

(*b*) Chan. Com. Rep. 40.

CHAP. XIV.

dence given by him in his affidavit had been given by him orally before the examiner, and after such cross-examination may be re-examined orally by or on the part of the party by whom such affidavit was filed (15 & 16 Vict. c. 86, s. 38, *ante*, pp. 416, 417).

And the witness is bound to attend before such examiner, to be so cross-examined and re-examined, upon receiving proper notice and payment of his reasonable expenses, as though he had been served with a *subpœna ad test.* (*ante*, 15 & 16 Vict. c. 86, s. 38).

The re-examination of any such witness is immediately to follow his cross-examination, and is not to be delayed to a future period (19 Cons. Ord. r. 9).

No affidavit or deposition filed or made before issue joined in any cause shall, without special leave of the court, be received at the hearing thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf (19 Cons. Ord. r. 12).

But there can be no examination of witnesses after the time for closing the evidence has expired, except by consent of the parties or special order of the court (*c*).

Protection of witness from arrest.

The court will sometimes protect a witness against a detainer lodged against him, when returning from his examination before the examiner or judge at chambers, when the deviations out of the direct route are necessary, and are *bonâ fide*, such as stopping to take refreshment, or examine account-books, etc. (*d*). So a creditor, attending to prove his debt before the commissioners of bankruptcy, has been held to be privileged from arrest (*e*).

(*c*) Sand. Ord. 119; 15 & 16 Vict. c. 86, s. 38.
(*d*) Sidgier *v.* Birch, 9 Ves. 69.
(*e*) List's Cases, 2 V. & B. 374.

Also, a defendant was ordered to be discharged who had been attending a warrant in the master's office to produce papers, and was arrested upon leaving the office (*f*).

Besides the ordinary means of examining witnesses after issue is joined in a suit (*g*), there is another method of taking their evidence, arising out of the peculiar circumstances of the case, or the state and condition of the witnesses themselves. This method is called an examination *de bene esse*.

Examination *de bene esse*.

The practice of examining witnesses *de bene esse* is said to have arisen from the desire of those judges who sat in the Court of Chancery in its earlier times to assimilate the proceedings in that court, as much as possible, to the course adopted by the Roman Civilians, whose manner of examining witnesses *in perpetuam memoriam rei* was two-fold—namely, the *common examination*, or *in meliori formâ*. The common examination was resorted to in those cases where the witnesses were very old and infirm, or in danger of death, or were about to journey to foreign parts: it was then usual to file a libel, without waiting till the actual commencement of the action, the *litis contestatio*. The plaintiff examined his witnesses, giving notice thereof immediately to the other side of the time and place of the examination, in order that the defendant might, if he thought fit, come in and cross-examine them; but, in this case, the plaintiff was obliged to commence his action within a year, otherwise the depositions went for nothing: the witnesses also, if they recovered, or did not go abroad, must have been examined *post litem contestatam*.

The examination *in perpetuam rei memoriam in*

(*f*) Franklin *v.* Colquhoun, 1 Madd. 580. *Vide* Gibbs *v.* Phillipson, 1 R. & M. 19.

(*g*) See Chap. XV. as to the present practice of taking evidence after issue joined.

CHAP. XIV.

meliori formâ was *ad transumenda instrumenta:* in this case, an action must have been already commenced; but, as in the proof of instruments there would not exist that emergency, as in those cases where the witnesses were in danger of dying, or going into remote countries, the actor or plaintiff was under no necessity to proceed in his action upon those instruments within the year.

In meliori formâ.

This latter method of examining witnesses, *i. e., in meliori formâ*, has been adopted by the Court of Chancery to perpetuate testimony to a disputable fact, when the witnesses are old and infirm and in danger of dying, or about to depart the kingdom, or where the witness is the only witness who can give evidence to an important fact; in such cases it is usual for the court to allow an examination to take place, although no suit is depending, for it may be that an interested party is only waiting for the death of that only witness to commence hostilities (*h*).

Also, where the thing examined into lay only in the knowledge of the witness, and was a matter of great importance (the question being whether or no a settlement was a forgery), he was ordered to be examined, though he was not proved to be old or infirm (*i*).

Difference between bills *in perp. mem. rei* and *de bene esse.*

It has been said (*k*) that the difference which exists between bills *in perpetuam rei memoriam*, and bills for the examination of witnesses *de bene esse*, is, that the former are filed by persons who are in the actual and undisturbed possession of property, to the title of which there can be no present chance of judicial investigation; consequently, to prevent a failure of justice, it is neces-

(*h*) Hind, Ch. Pr. 365; Dan. Ch. Pr., by Headlam, 909.

(*i*) Shirley *v.* Earl Ferrers, 3 P. Wms. 77; Pearson *v.* Ward, 1 Cox, 177.

(*k*) Newl. Ch. Pr., 3rd edit., 450. See also Lord Dursley *v.* Fitzhardinge, 6 Ves. 254.

sary that some means should be resorted to, for the sake of preserving the testimony of witnesses, although they may neither be aged nor infirm, nor witnesses going abroad, and although the material fact may be evidenced by more than one witness (*l*): where, however, a person is either out of possession, or, being in possession, is disturbed in it, or has an action brought against him, as having a tortious title, he may assert his right either by an action to be commenced by him, or in the action brought against him. In such cases, there is no necessity for applying to a court of equity; for an action being brought, the party desirous of preserving the testimony of his witnesses will have ample opportunity of so doing, unless indeed there be sufficient proof of his being in danger of losing their evidence before the action is brought to a trial: and in case his testimony is required to be used in the action, a bill must be filed in chancery, for the examination *de bene esse*, with the proper affidavit. A motion is then made for the required order; but the action in which such testimony is required to be used must have been actually commenced before the bill for the examination *de bene esse* is filed. There is no distinction between this examination and that which is adopted in the ordinary method of examining witnesses.

(*l*) By the act for extending the means of perpetuating testimony in certain cases (5 & 6 Vict. c. 69), "any person who would under the circumstances alleged by him to exist, become entitled upon the happening of any future event to any honour, &c., or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, shall be entitled . . . . to file a bill . . . . to perpetuate any testimony which may be material for establishing such claim or right." This seems to extend the device to cases where the plaintiff claims a vested or contingent and remote interest which defendant can bar, *sed quære*. See Coop. Eq. Pl. 52—54; Story, Eq. Pl. § 301, as to the rule before this Act.

CHAP. XIV.

Formerly the witnesses were examined upon interrogatories. But since the 15 & 16 Vict. c. 86, the examination *de bene esse* is to be taken orally in the method prescribed by the Act (*m*).

The examination may, if the witness is in town, be taken by one of the examiners of the court. If the witness is or resides in the country, a special examiner may be appointed, and the opposite party is entitled to forty-eight hours' notice of the appointment, for the purpose of the cross-examination (*n*).

By Cons. Ord. IX. r. 6, witnesses shall not be examined *in perpetuam rei memoriam*, unless a bill shall have been filed for the purpose. The bill is not set down for hearing (r. 7); it prays only for leave to examine the witnesses as to the matters stated, and if defendant answers, admitting plaintiff's title to examine, the witnesses are examined and there is an end of the case; except that defendant, if he has not (as he may) examined any witnesses, may obtain an order of course for his costs. The bill may be taken *pro confesso* and thereupon the examination will be ordered. If the right is disputed by the answer, liberty has been given to both parties to examine witnesses on the point in issue (*o*). The evidence is by Ord. 5th February, 1861, r. 16, to be taken as before that order; that is, before examining in the presence of all parties or by affidavit, and subject to cross-examination and re-examination.

Practice in reference to cross bill.

Where a cross bill has been filed by a defendant against the plaintiff to the original suit, and he is in contempt for not putting in his answer to the cross suit, a motion to stay proceedings in the original cause is not the proper

(*m*) Cook *v.* Hall, 9 Hare, Append. 20; 16 Jur. 1008.

(*n*) Reeves *v.* Hodson, 21 Law Times, 124; Pillan *v.* Thompson, 10 Hare, Append. 76; 17 Jur. 781.

(*o*) Morg. 410.

course; but the defendant to such original suit must apply to enlarge the time for closing the evidence therein, until a fortnight after the answer to the cross bill shall have been filed (*p*). This application must be made upon motion, which is not of course, but of which notice must be given (*q*); and it seems that, even after answer, the time for closing the evidence is not enlarged as of course, until the coming in of the answer to the cross bill (*r*).

(*p*) Creswick *v.* Creswick, 1 Atk. 291.
(*q*) Aylet *v.* Easy, 2 Ves. sen. 336.
(*r*) Dalton *v.* Carr, 16 Ves. 93; Cook *v.* Bromhead, ibid. 133.

CHAPTER XV.

TIMES, ETC.—EVIDENCE ON MOTION FOR DECREE—REPLICATION, NEW ORDERS—PRODUCTION OF WITNESS FOR CROSS-EXAMINATION.

Closing evidence.

Upon motion for a decree the evidence is by affidavits, and the answer, if any, is treated as an affidavit (15 & 16 Vict. c. 86, s. 15). Plaintiff's affidavits must be filed before service of the notice of motion, and a list of them must be appended to the notice. Defendant must file his affidavits in answer within fourteen days after service of the notice and give plaintiff a list of them, who has then fourteen days more to file affidavits strictly in reply only, and unless they are so in reply only they will be disregarded, unless the court give defendant leave to answer them. No further evidence can be used without special leave obtained (Cons. Ord. 33, r. 4—8). The times, however, may be enlarged in hard cases, and a party may sometimes get leave to answer affidavits which take him by surprise. The witnesses may be cross-examined on their affidavits and re-examined in the presence of the parties before the examiner; and an unwilling witness may also be so examined in chief, these examinations following one another immediately in the presence of the parties, their counsel, &c. (15 & 16 Vict. c. 86, ss. 31—38). An examination in chief cannot be had until notice of motion is served.

As to evidence where issue is joined, that is, on replication, without adverting to the former practice respecting the rules to produce witnesses after their examination at

the proper office in town, or by commissioners in the country, it will be sufficient in this place to state briefly the new practice introduced by the 15 & 16 Vict. c. 86, s. 38, before stated, and now regulated by the 6th Gen. Ord. 13th January, 1855, and 19 Cons. Ord. r. 12, *ante;* and also the more recent Orders, 5th February, 1861.

If either party is unable to complete the examination before the time for closing evidence expires, he must make an application to enlarge the time, which is now made to the judge while sitting at chambers.

Where such enlargement of time has been obtained at the instance of one party, all the other parties are enabled to examine witnesses under it.

The court will, sometimes, under the discretionary power contained in the 15 & 16 Vict. c. 86, according to the special circumstances of the case, allow the plaintiff at the hearing to produce a further affidavit after the time for closing evidence has expired, and after the cause has been set down for hearing (*a*).

And now by the new Orders, 5th February, 1861, the method of taking evidence under the last-mentioned Act is somewhat altered and brought nearer to the common-law practice of examination. These Orders relate to evidence to be taken at the hearing only and after issue joined. The principal objects are, 1st. That an order may be obtained upon summons at chambers for the purpose of taking evidence *vivâ voce* at the hearing upon any specified facts, which facts are to be made out to the satisfaction of the judge. 2. That any examinations before the examiner are to be *ex parte*, and any cross-examination thereon or upon the affidavits is to be made at the hearing. 3. Where a witness has been so exa-

(*a*) Hope *v.* Threlfall, 2 Eq. Rep. 49; 17 Jur. 1021; 2 Week. Rep. 4.

mined *ex parte* before an examiner, or has made an affidavit, notice of cross-examination at the hearing may be given by the opposite party, and if not produced the witness's evidence cannot be used without leave.

This Order commences by abrogating the 3rd and 4th rules of the 18th Cons. Gen. Ord., and rules 3, 7, 9 and 13 of the 19th Cons. Gen. Ord.

By the 3rd rule of the Order, in any cause the plaintiff or any defendant may within fourteen days after issue joined, apply to the judge in chambers by summons, to be served on the opposite party, for an order, that the evidence in chief may be taken *vivâ voce* at the hearing, and the judge may order the evidence of such facts or issues distinctly and concisely specified in such order to be taken accordingly, or, if satisfied that the application is unreasonable, oppressive or vexatious or made for delay, may refuse the order. When such order is made, the examination in chief, cross-examination, and re-examination, will be taken before the court at the hearing as to the issues specified, and no affidavit or evidence taken before an examiner will be admissible at the hearing in respect of any such fact or issue included in such order.

Except as when provided by the last rule, and where it is deemed expedient under r. 11 on account of the age, infirmity, or absence out of the jurisdiction of a witness, to take his evidence otherwise (see *post*), no plaintiff or defendant can require the evidence in chief at the hearing to be taken orally; and, save as before mentioned, each party after issue joined may verify his case either wholly or partially, by affidavit or oral examination *ex parte*, before an examiner under the 6th rule of the order (r. 4). Such evidence in chief on both sides (including the cross-examination and re-examination of any person under the 10th and 11th of the rules) must be ***closed*** within eight weeks after issue joined, unless enlarged by

special order (r. 5). Except under 10, 11, 16 and 17 of these rules, every examination taken by the examiners of the court, or by any special examiner, for the purpose of being used at the hearing, is to be taken *ex parte*, and deemed an affidavit, and the examiner is to mark it as taken *ex parte* (r. 6). And, save under such last excepted rules, no cross-examination of any party or witness, to be used at the hearing of a cause in which issue is joined, is to be taken otherwise than before the court at the hearing (r. 7). If, however, after issue joined, the parties by writing, signed by them or their respective solicitors, and filed at the office of the clerk of records and writs, *agree* that the oral examination in chief and cross-examination of any witness, or the cross-examination of any person who has made an affidavit, or who has been examined *ex parte* before an examiner, shall be taken before an examiner in manner provided by 15 & 16 Vict. c. 86, such examination may be taken accordingly. These examinations, cross-examinations and re-examinations must immediately follow each other (r. 10). The court or judge may direct that the oral examination and cross-examination of any witness or party, or the cross-examination of any person who has been examined *ex parte* before an examiner, or made an affidavit, be taken before an examiner of the court or a special examiner, under the 15 & 16 Vict. c. 86, if it appears that owing to the age, infirmity, or absence out of the jurisdiction, or for any other cause, it is expedient that such direction be given, which may be obtained on application to the court or judge in chambers on notice (r. 11). Where in any cause or matter a party has filed an affidavit, or where in any cause in which issue has been joined a witness has been examined *ex parte* under rule 6, any opposite party, desiring to cross-examine the deponent or witness, shall not be obliged to procure his attendance either before the

examiner or before the court, but may serve upon the party by whom such affidavit has been filed or witness examined, or his solicitor, a notice in writing requiring the production of such deponent or witness for cross-examination before the examiner or before the court, such notice to be served, unless otherwise ordered, as follows: —Where such cross-examination is to be taken before the court at the hearing of a cause in which issue is joined before the expiration of fourteen days from the closing of evidence; and where such cross-examination is to be taken before the examiner in a cause in which a notice of motion for a decree or decretal order has been served, and to be used at the hearing of such motion, then at any time before the expiration of the fourteen days next after the end of the time allowed for the plaintiff to file affidavits in reply; and in every other case within fourteen days next after the filing of the affidavit or examination upon which such defendant or witness is to be cross-examined; and unless such deponent or witness be produced accordingly, such affidavit or examination cannot be used as evidence unless by the special leave of the court. The party producing such deponent or witness shall be entitled to demand the expenses thereof in the first instance from the party requiring such production, but such expenses shall ultimately be borne as the court shall direct (r. 19). The party to whom such notice is given may compel the attendance of such deponent or witness for cross-examination in the same way as he may compel the attendance of a witness to be examined where an order is made for taking evidence *vivâ voce* at the hearing under the 3rd rule (r. 20). Under the 19th rule, at the hearing of a cause in which issue is joined, either party may upon notice apply to the court or to the judge at chambers to fix a day for the hearing of the cause (r. 21). Notice of examination or cross-

examination of any witness, whether before the court or one of the examiners, or a special examiner, must be given to the opposite party forty-eight hours before; and such notice must contain the name and description of the witness, and the time and place of such examination or cross-examination, unless the court think fit to dispense with such notice (r. 22). Where an affidavit is to be used as evidence before the court or a judge at chambers, the deponent in each statement must show his means of knowledge (r. 23). The 24th rule relates to consents as to the mode of procedure on behalf of persons who are under disability.

CHAPTER XVI.

SETTING THE CAUSE DOWN FOR HEARING—SUBPŒNA TO HEAR JUDGMENT—HEARING THE CAUSE—DECREE NISI AND FINAL.

THE time for setting down a *motion for a decree* is one week after the time allowed plaintiff to file his affidavit in reply, in case the defendant shall have filed any affidavit, or within one week after the time *allowed* to the defendant to file his affidavits in answer, in case he shall not have filed any affidavit. But if the time allowed for either of the purposes shall be enlarged, then within one week after the expiration of such enlarged time (Ord. 22nd Nov. 1866, r. 2). And if the plaintiff shall fail to set down the motion within the time above limited, the defendant may either move to dismiss the bill with costs, for want of prosecution, or set the motion down at his own request (Id. r. 3). After the week the motion will not be set down without the consent in writing of defendant's solicitor (*a*).

Setting down the cause.

When the cause being at issue the examination of witnesses has taken place, and the time for closing the evidence has elapsed (unless where it has, by application, been enlarged), the plaintiff is at liberty to set down his cause to be heard and obtain and serve a *subpœna* to hear judgment. If the plaintiff neglects to do so, any defendant, after the expiration of four weeks, may set the same down at his own request, instead of proceeding to

(*a*) Dan. 767.

dismiss the bill for want of prosecution, and he may obtain a subpœna to hear judgment and serve it on the plaintiff (21 Cons. Ord. r. 1).

Where the plaintiff, having obtained no order to enlarge the time, does not, within four weeks after the answer or the last of the answers required to be put in by such defendant is held or deemed to be sufficient, or after the filing of a traversing note against such defendant, file the replication, or set down the cause to be heard on bill and answer, or serve a notice of motion for a decree or decretal order, or obtain and serve an order for leave to amend the bill, the defendant may move to dismiss the bill for want of prosecution (33 Cons. Ord. r. 10; Ord. 22nd Nov. 1866).

Where a defendant to a suit commenced by bill, who shall not have been required to answer the bill, shall not have answered the same, he shall be at liberty to apply for an order to dismiss the bill for want of prosecution at any time after three months from the time of his appearance, unless a notice of motion for a decree or decretal order shall have been served in the meantime, or the cause shall have been set down to be heard (33 Cons. Ord. r. 13) (*b*).

When there is an abatement of the suit as to one of several defendants, and other parties are thereby brought before the court, they must each be served with a subpœna to hear judgment; but the rest of the defendants need no such service.

Certificate of record and writs clerk.

Previous to setting the cause down and obtaining the subpœna the plaintiff must obtain the certificate of the clerk of the records and writs that the various pleadings in the cause have been duly filed, which certificate will

(*b*) It is stated to be doubtful whether this order applies to the case where replication has been filed. Morg. 539. But it would seem defendant could move under Ord. 21, r. 1.

not be granted unless all the defendants who are within the jurisdiction and have been required to answer, have answered the plaintiff's bill.

By an Order, 23rd Feb. 1850, all causes thenceforth to be heard before the lord chancellor, or one of the vice-chancellors, shall be set down for hearing by the registrars upon production to them of the certificate of the proper officers that the same is in a fit state to be set down for hearing, without any fiat, order or direction from the lord chancellor for that purpose (21 Cons. Ord. rr. 2 and 9; and 6 Cons. Ord. rr. 2 and 3).

By virtue of the order the solicitor who applies to have a cause set down for hearing is to indorse on the record and writ clerk's certificate his name or firm, and the party for whom he acts, and also the date, with a memorandum stating, if there be any infant defendant, that a guardian *ad litem* has been appointed, or if there be no such defendant stating so (Reg. Reg. March 15th, 1860, r. 7).

Formerly the cause might be set down before either the lord chancellor or the master of the rolls at the option of the plaintiff, according to the nature and importance of the suit and the arrears of causes put down to be heard before each of them respectively. But according to the present practice the plaintiff must, when he files his bill, distinctly mark at or near the upper part thereof at his discretion the words "Lord Chancellor," or the words "Master of the Rolls:" and if with the words "Lord Chancellor," then also with the name of one of the Vice-Chancellors, as the plaintiff may think fit (*c*). But the cause may either before or after it is thus set down be transferred to the court of any other judge by the special order of the lord chancellor or the lords justices, whenever it is deemed convenient so to do (*d*). The

(*c*) Ord. VI. r. 1.

(*d*) Id. 10 W. R. 261, L.JJ.

order for transfer of a cause from one branch of the court to another is made upon motion with notice (*e*); but the consent of the judges from whom and to whom the cause is to be transferred, and the leave of the lord chancellor or the lords justices to give notice of motion, must be first obtained: these are usually obtained as a matter of course on an *ex parte* application by counsel. Whenever such leave is given, the motion will be placed in the paper for the day appointed for the hearing. If the cause happens to be attached to the Rolls Court the order of transfer must be made by the master of the rolls as well as the lord chancellor or the lords justices (*f*). When the order of transfer is passed and entered it should be left with the record and writ clerk in order that it may be entered in his cause-book (*g*).

A copy of the bill must be prepared for the use of the judge before whom the cause is set down for hearing.

Consent and short causes.

Besides the causes in the general paper, there is a paper of *consent* causes and *short* causes: the former is where the decree is of course and consented to by the other party, and where the defendant submits to attend the hearing without being served with a subpœna for that purpose; *short* causes are where the decree is either of course or involves but little difficulty. A short cause being set down in its turn in the cause-book is, upon a certificate of plaintiff's counsel that it is a short cause, marked "short;" but will not be so marked, in the case of causes for original hearing for any day before the day when the *subpœna* to hear judgment is returnable, or in the case of causes for further consideration, until after the expiration of ten days, or in the case of motion for a decree

(*e*) Bond *v.* Barnes, 2 De G., F. & J. 387.
(*f*) 5 Vict. c. 5, s. 30.
(*g*) Dan. Pr. 363.

CHAP. XVI.

for any day before the day for which the notice of motion is given, unless in either case by consent of all parties (*h*). One day in each week is usually fixed during the sittings of the court for hearing these causes.

In the case of Hutchinson *v.* Stephens (*i*), however, the master of the rolls stated that it was his custom to dispense with the consent of the solicitor of the defendants, on the counsel for the defendants declining to say that the causes are not proper to be heard as short causes. And, in the same case, it was also held that a special application on the part of the defendant to have a cause advanced and heard as a short cause will be granted, unless the counsel for the plaintiff will undertake to say that the cause ***is not*** a proper one to be so heard.

But now by the above regulation of the registrars, causes are marked to be heard as short upon the certificate of plaintiff's counsel only, no consent from any solicitor in the cause being requisite (Reg. Reg., June, 1854; 15 March, 1860, r. 10).

The cause (*k*) being set down for hearing, and the plaintiff's solicitor having obtained from the registrar a note thereof in writing, which fixes the day of hearing, leaves it with a præcipe for a subpœna to hear judgment at the clerk of the records and writs.

The subpœnas may each contain the names of three

(*h*) 1 Newl. Ch. Prac. 305; Reg. Reg., 15 March, 1860, r. 10.

(*i*) Hutchinson *v.* Stephens, 1 Keen, 663.

(*k*) The word "cause" is not applicable to a motion for decree, for which no *subpœna* is requisite. But a *subpœna* must be obtained and served where the cause is at issue by the filing a replication, not only on the defendant who answered but on those against whom a traversing note has been filed, or who, not being required to answer, have not answered, and upon a defendant against whom the suit is heard upon bill and answer (see the form of replication, *ante*); but it is not necessary in the case of a defendant against whom the bill is to be taken *pro confesso*. Dan. 869.

defendants, and are served either on the defendants themselves or their solicitor.

Subpœna to hear judgment.

The return of the subpœna *ad audiendum judicium* may now, under the provision of the 21 Cons. Ord. r. 4, be made as well in the vacation as in term. It is not to be returnable at any time less than one lunar month from the teste of the writ (21 Cons. Ord. r. 5). The plaintiff must within four weeks after the time for closing the evidence has expired (formerly after publication had passed) obtain and serve a subpœna to hear judgment, with an indorsement thereon of the solicitor issuing the same; otherwise the defendant may move to dismiss the bill for want of prosecution (21 Cons. Ord. r. 1). In order to ensure the one month between the teste and return of the writ, the subpœna ought to be issued on the same day the cause is set down for hearing. The subpœna must be served at least ten days before the return thereof. To render the service effectual, it must be made within twelve weeks after the teste of the writ (28 Cons. Ord. r. 1).

The rules respecting the mode of serving the process of subpœna are the same as those to which allusion has been already made in relation to the former practice of the subpœna to appear and answer.

Hearing of the cause.

The foregoing requisites having been attended to, the suit is now put down in the paper of causes for the day, which are taken as they stand in rotation on the registrar's book. On the cause being called on in its turn, the usual course is for the senior counsel for the plaintiff to open the pleadings, who commences by stating his case and the points which are at issue, and argues the same before the court; the plaintiff"s evidence is next read, together with such parts of the defendant's answer

as are considered favourable to the plaintiff's case. This is done by the plaintiff's leading counsel, or his junior, who follows him. The defendant's counsel then, in like manner, submit their arguments to the court, and read such of the depositions of the defendant's witnesses as are necessary to support his case, but no part of his answer when the case is heard upon replication, except to explain the pleadings or the passages which have been read by the plaintiff. On motion for decree the answer is treated as an affidavit and used as other evidence. The senior counsel for the plaintiff now replies, and, lastly, the judge pronounces the decree.

Where a defendant makes default at the hearing the decree is absolute in the first instance, to such effect as plaintiff appears upon the pleadings and evidence entitled to, without giving the defendant a day to show cause; and such a decree now has the same force as if it had been a decree *nisi* in the first instance, and afterwards made absolute in default of cause shown by the defendant (23 Cons. Ord. r. 12).* But plaintiff must produce before the rising of the court the same day an affidavit of service upon the defendant of the *subpœna* to hear judgment: otherwise the cause must be restored to the paper, and notice be given thereof to defendant, who may appear and argue the cause when again brought on (*m*).

In case the plaintiff does not appear at the hearing, the defendant, on producing an affidavit in court of his having been served with a subpœna to hear judgment, or, if defendant set down the cause, of the service of the subpœna upon the plaintiff, may have the bill dismissed with costs against the plaintiff.

23 Cons. Ord. r. 13.

By 23 Cons. Ord. r. 13, if the plaintiff, after the cause

* See 22 and 23 Cons. Ord., as to taking the bill *pro confesso* for want of answer.

(*m*) Dan. 879, n. (*e*).

is set down to be heard, procure his bill to be dismissed on his own application—or if, upon its being called on to be heard, the plaintiff makes default, and by reason thereof the bill is dismissed,—such dismissal, unless the court otherwise orders, is to be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.

If the suit is heard on motion for a decree, the court will make a decree in the absence of defendant on proof of service of the notice of motion,—which decree, however, may sometimes be re-opened on motion. If plaintiff fails to appear, defendant may have the bill dismissed without proof of the service of the notice (*n*).

Difference of a decree in respect to an infant plaintiff or defendant.

With respect to a decree binding on an infant, there is a difference whether he stands in the condition of plaintiff or defendant in a suit. If he be a plaintiff, he is equally bound by a decree as a person of full age (*o*); but, where he is the defendant in a cause, he is not conclusively bound by the decree of a court of equity, but must have a reasonable time after he comes of age to show cause against it; for all infant defendants, by their answer, put in an early claim to the care and protection of the court, as they are unable to take care of themselves (*p*). And where there was a decree against an infant, omitting to give the usual period of six months to show cause against it after he came of age, such decree was held to be erroneous (*q*); and, in another case, it was determined that, where a notice was not given to an infant defendant to show cause within six months after he came of age, he might answer anew: and this provision is introduced into decrees from the general superin-

(*n*) Dan. 768.

(*o*) Gregory *v.* Molesworth, 3 Atk. 626; Lightburne *v.* Swift, 2 Ball & B. 213.

(*p*) Effingham *v.* Napier, 3 Bro. P. C. 301.

(*q*) Savage *v.* Carroll, 1 Ball & B. 551.

CHAP. XVI.

tendency the court has over infants, and therefore all decrees against them allow six months after they come of age to show cause (*r*).

(*r*) Napier *v.* Effingham, 2 P. Wms. 401.

* The existence of this distinction appears to rest upon no solid foundation either in reason or in justice. It is at best but a mere fiction, and the results to an infant plaintiff may be equally disastrous as though he were an infant defendant deprived of the six months for deliberation upon his coming of age. The theory is this, *i. e.* that in the case of an infant plaintiff the court is put into motion both on behalf of himself as well as on behalf of his estate, and that, therefore, both the one and the other being brought under the protection of the court, no possible harm can befal either by the court's decree; whilst on the other hand the infant defendant has no alternative,—he must at the instance of a mere stranger be of necessity brought before the court,—and therefore it would be hard indeed not to allow him an opportunity after he comes of age of impeaching the decree made against him during his minority. But it must be remembered that, in both cases, notwithstanding the 15 & 16 Vict. c. 86, s. 11, the infant plaintiff and infant defendant are equally passive, and in the instance of an infant plaintiff the bill is filed by a next friend, technically so called, who may in reality be an entire stranger to the infant, but who is too often a tool in the hands of a crafty unprincipled individual, who, having planned the whole suit himself, is made defendant in the shape of a trustee or executor, and who being bent upon working out his own schemes is only too happy to indemnify such next friend for his services in thus bringing both the infant and his estate before the Court of Chancery. The fact is, that under the above circumstances an infant plaintiff can no more help being brought into litigation, however unwilling he or his nearest relatives may be, than can an infant defendant; and it seems therefore to be against all claims of justice and common honesty to allow the six months after the defendant has become *sui juris* to impeach an hostile decree in the one case and not in the other. But consider on the other hand the inconvenience of leaving matters affecting the interests of others unsettled for a long time, and indeed often the great injustice of keeping them out of their rights. It is almost of necessity also in many cases to settle matters finally or to realize assets speedily for the benefit of the infants themselves.

The decree is, as a rule, binding against an infant, and he can only dispute it upon the same grounds as an adult might—such as fraud, collusion or error—before or after coming of age ; and the infant defendant had, as a rule, only a day to show cause where a sale or foreclosure or partition was asked, or in a suit which required a conveyance or some act to be done by him. This is by 11 Geo. IV. & 1 Will. IV. c. 47, no longer necessary in suits to compel payment of debts out of real estate, but the court can convey. And by the Trustee Act, 1850, s. 30, wherever the court can make a decree for a conveyance, it can make a vesting order as to the infant's interests binding on him. And under the Partition Act, 1868, the court can direct a sale and carry it out against an infant (*s*). An infant plaintiff in a partition suit or other suit which affected his inheritance and required a discretionary act on the part of the court would have a decree only, without prejudice to his rights on attaining majority. The court would leave the matter open till that event (*t*). (*But see above.*)

Foreclosure suit against an infant.

When there has been a decree in a foreclosure suit against several defendants, one of whom is an infant, he cannot be foreclosed without a day to show cause ; but if the court has decreed a sale, that binds the infant (*u*): and in a late case (*v*) where there was a decree against the infant heir of an estate, subject to an equitable mortgage, the vice-chancellor was of opinion that, as the decree directed the estate to be sold, the infant ought not to be allowed the six months ; but that, if the decree had been a foreclosure, the infant ought to have been allowed the

(*s*) See Dan. 161—164.
(*t*) Dan. 75, 76.
(*u*) Booth *v.* Rich, 1 Vern. 295.
(*v*) Scholefield *v.* Heafield, 7 Sim. 670; 8 Sim. 470.

CHAP. XVI.

six months. And in realizing a mortgage security, where the devisor or heir of the mortgagor is an infant, it is the usual practice of the court to refer it to the chief clerk or judge at chambers, to inquire whether a sale of the mortgaged property will be beneficial to the infant; but where, from the circumstances of the case, it appears to be clear that such a sale would be for the benefit of the infant, the court will direct a sale in the first instance (*x*). But in a foreclosure suit against an infant, although he has six months after he arrives at age to show cause, yet he cannot ravel into the account, nor is he so much as entitled to redeem the mortgage by paying what is reported due, but is only entitled to show an error in the decree (*y*).

If an infant be aggrieved by a decree, he cannot be compelled to stay till he arrives at age, but may apply as soon as he thinks fit to reverse it; and he may do this either by bill of review, re-hearing, or by original bill, alleging specially the errors in the former decree (*z*).

On the hearing of a motion for a decree the plaintiff may have the same relief according to the prayer of the bill as on replication (*a*), or the court may dismiss the bill (*b*), or it may refuse the motion only and leave the suit pending to be brought to a hearing on replication (*c*).

(*x*) Davis *v.* Dowding, 2 Keen, 245. And under 15 & 16 Vict. c. 86, s. 48, the court can in all suits for foreclosure order a sale if it thinks fit, and will do so if it appear to be for the benefit of an infant, and without a previous reference to inquire whether it be so if that clearly appears. Dan. 165.

(*y*) Mallack *v.* Galton, 3 P. Wms. 352.

(*z*) Richmond *v.* Tayleur, 1 P. Wms. 737.

(*a*) Norton *v.* Steinkopf, 1 Kay, App. 10.

(*b*) Robinson *v.* Lowater, 2 Eq. Rep. 1070.

(*c*) Thomas *v.* Bernard, 5 Jur., N. S. 31; Warde *v.* Dickson, ib. 698.

The hearing may be sometimes advanced by consent, and a motion for injunction or other motion is often by consent turned into a motion for a decree at the hearing, so as to dispose of the whole case at once, or is allowed to stand over to be heard as a motion for a decree.

Though it was formerly otherwise (*d*), "foreclosure causes, when ready for hearing, may be ordered to be advanced for hearing, under the same circumstances, and subject to the same rules as other causes may be ordered to be so advanced." (Cons. Ord. 21, r. 6.)

(*d*) Rachleigh *v.* Dayman, 2 Mad. 147.

CHAPTER XVII.

MINUTES OF THE DECREE—RE-HEARING—PETITION OF APPEAL—CAVEAT AGAINST THE DECREE—BILL OF REVIEW.

Decree *interlocutory* or *final.*

A DECREE is the sentence of the court, and is equal to a judgment at law (*a*). Decrees are either *interlocutory* or *final* (*b*). An interlocutory decree is a sentence of the court, which reserves to itself a particular matter, or the further consideration of the cause generally, for the purpose of ascertaining in the meantime some matter or fact to be tried by a jury or by the court, or of allowing accounts or inquiries or other thing to be done as directed to enable it to make a final decree (*c*). Otherwise a decree is final, and when it is signed and enrolled may be pleaded in bar to any new bill for the same matter (*d*).

After the cause has been heard, minutes or heads of the decree are taken down by the registrar in court, for a future hearing. He will then prepare a draft decree for the solicitor bespeaking it, and minutes to be handed to the several other solicitors in the cause.

The party bespeaking the decree must leave all the proper papers and briefs with the registrar. The minutes being *settled*, which is done by the parties attending before the registrar on a day appointed by the registrar

(*a*) Searle *v.* Lane, 2 Vern. 88.
(*b*) Pl. 452.
(*c*) 1 Newl. Ch. Pr. 322; Dan. 894.
(*d*) Dan. 894.

for that purpose, the decree is *drawn up* by that officer and delivered out to the party in whose favour such decree is made, and an office copy thereof is taken up by the opposite party (Cons. Ord. 1, rr. 20—26).

For the sake of rendering the decree perfect there remains, after the minutes have been settled and the decree drawn up, to *pass* and *enter* the same in the books kept for that purpose. Passing or signing the decree is effected by the registrar naming a time in the presence of the parties, or sending a note in writing to the adverse party's solicitor, stating that the decree will be passed on a certain day mentioned therein, and requiring him to bring his copy and attend at the passing, and in default of such appearance and to produce briefs and other necessary documents the decree will be passed without him (*e*). The decree, having been passed, is left by the registrar's clerk with the entering-registrar, to be *entered* in the books before mentioned, which are afterwards taken to the *report office* for the purpose of easy reference (Cons. Ord. 1, rr. 18, 19).

The decree, having been passed and entered, cannot be reversed or altered, unless by a re-hearing; and, if it have been signed and enrolled, and it is sought to be remedied on the discovery of new matter, by a bill of review. Where, however, there appears any clerical error in drawing up the decree, or any evident mistake on the face of the schedule to the chief clerk's certificate, the court will not put the party to the form or expense of a re-hearing, but will rectify the decree upon motion.

(*e*) 1 Newl. Ch. Pr. 316; Cons. Ord. 1, r. 28. The registrar may settle and pass the decree without making an appointment and without notice to any party, Ord. 1, r. 32. And he may decline to draw up the decree without leave of the court, if it is not bespoken and the briefs and other documents not left with him within seven days after the decree pronounced. Ord. 1, rr. 21, 22.

CHAP. XVII.

If either party is dissatisfied with the registrar's decision, he may on notice move to vary the minutes. Sometimes the court itself at the hearing directs the cause to be spoken to on the minutes, when prepared, which must be done within a fortnight.

Re-hearing before enrolment.

Wherever a party is dissatisfied with the decree, he may obtain a re-hearing of the cause before any of the judges in whose court it was heard, provided the decree has not yet been signed and enrolled. And, in case the hearing took place before the master of the rolls, or either of the vice-chancellors, the party may obtain a re-hearing before them, or, if he choose, may, by a petition of re-hearing, procure the cause to be heard by the lord chancellor or the court of appeal in chancery. But, after the decree has been enrolled, the cause can neither be re-heard, nor can the parties appeal to the chancellor's court, because the effect of enrolling a decree is to make it the lord chancellor's decree, and a record of the court. If, therefore, either the plaintiff or defendant be desirous to have a re-hearing, but is not sufficiently prepared with his petition of re-hearing, it is advisable for him to enter a *caveat* against the decree, to prevent it being enrolled; since, after the enrolment, the party aggrieved can only appeal from either of the courts to the House of Lords, where the cause will again be heard, and the decree either altered, reversed, or affirmed, as to them may seem meet, and from which there is no further appeal, except by a bill of review, either upon error apparent or upon new matter, discovered since the expiration of the time for closing evidence in the original cause (*f*).

Caveat against decree.

But the court has in some cases, notwithstanding this

(*f*) Mitf. 88; Barbon *v.* Searle, 1 Vern. 416; Cons. Ord. 31, r. 9.

rule, relaxed its practice and corrected accidental slips after enrolment upon petition or motion (*g*).

And clerical mistakes in decrees or orders, or errors arising from any accidental slip or omission, may at any time before enrolment be corrected upon motion or petition without a formal re-hearing (Cons. Ord. 23, r. 1).

A decree or order made on the hearing of a cause, or of a motion for a decree or of a demurrer or plea, or upon a petition or a special case (under the 13 & 14 Vict. c. 35), can only be altered, varied or discharged in chancery by means of a petition of re-hearing, which is drawn or settled by the junior counsel of the appellant, and is intituled in the cause or matter, and must be signed by two counsel as proper to be re-heard (*h*).

The re-hearing cannot take place upon matters arising after the hearing (*i*).

No appeal from any order or decree, nor any re-hearing of the case, is allowed unless set down for hearing and proper notice served within five years from the date thereof, unless the lord chancellor or lords justices consider it just and expedient under the circumstances and enlarge the time (Ord. 31, r. 1).

Appeal to House of Lords.

No appeal lies *directly* from a sentence or decree pronounced in the master of the rolls' court, or those of the respective vice-chancellors, to the House of Lords; for, if either of the parties be desirous of so appealing, they

(*g*) Fearon *v.* Desbrisay, 21 L. J., Ch. 511; Hewitt *v.* White, 14 W. R. 220; Viney *v.* Chaplin, 3 De Gex & J. 282; Turner *v.* Hodgson, 9 Bea. 265; Weston *v.* Haggerston, Coop. 134; Cradock *v.* Owen, 2 Sm. & G. 241; *Ex parte* The Justices of Essex, 22 Law Jour. 328; Attorney-General *v.* Greenhill, 34 Beav. 174; Hughes *v.* Jones, 26 Beav. 24.

(*h*) Dan. 1355, 1361.

(*i*) But see some exceptions, Dan. 1356, 893.

CHAP. XVII.

must first procure such sentence or decree to be signed by the lord chancellor and enrolled, which process, we have seen, constitutes it a decree of his own court. And, it may be here observed that, if the decree were pronounced by any person sitting for the lord chancellor, or by the master of the rolls, at the Rolls, or by the respective vice-chancellors, it must be signed both by the person pronouncing the decree and by the lord chancellor.*

Notice of appeal.

When a party is desirous of appealing to the House of Lords from the chancellor's decree, he must cause a notice to be given to the agent of the parties respondent of the time when the petition is intended to be presented, and the day of giving such notice must be indorsed by the petitioner's agent on the back of the appeal (*k*).

Appeal exhibited by way of petition.

An appeal to the House is exhibited by way of petition, and must be signed by two counsel, who may be either such as were engaged in the cause in the court below, or who are to attend at the bar of the House at the hearing of the appeal, and who must certify that there is reasonable cause of appeal (*l*). The appeal must be presented within two years from the enrolment of the decree or order and within fourteen days, reckoning from the first day of every session or meeting of Parliament after the recess; after which the lords will not receive a petition of appeal

* Since the appointment of the lords justices, a rehearing by that court of a decree or order made by the master of the rolls or a vice-chancellor is in fact an appeal; the term appeal, therefore, is sometimes used to include rehearings and appeals in Chancery as well as appeals to the House of Lords.

Thus a cause which has been heard by the master of the rolls or one of the vice-chancellors may either be heard before the judge before whom it was originally argued or by the Court of Appeal. In this latter case it is usually termed an appeal, although in reality only a rehearing. Dan. Pr. 1344, 1357.

(*k*) House of Lords' Journ., 9th April, 1812.

(*l*) House of Lords' Journ., 3rd March, 1697.

during any such sitting, unless upon a decree made whilst the Parliament is actually sitting, in which case the party aggrieved may bring his petition of appeal, provided he present it to the House within fourteen days after such decree is made and entered in any court of equity in England or Wales, twenty days in any of the courts in Scotland, and forty days in any of the courts of equity in Ireland (*m*). And, by a subsequent Order (*n*), a limitation is prescribed beyond which parties are not at liberty to present these petitions; for it declares that no petition of appeal from any decree or sentence of any court of equity in England or Ireland, or of any court in Scotland, shall be received after *five years* from the signing and enrolling, or extracting, of such decree or sentence, and the end of fourteen days from and after the first day of the session or meeting of Parliament next ensuing the said five years. But, by the same Order, an exception is made in the case of infants, married women, non-compotes, prisoners, and persons out of Great Britain or Ireland, who are allowed to bring their respective appeals within five years next after such disability shall cease, and fourteen days from and after the first day of the session next ensuing the said five years, but not after.

It is now settled in a recent case (*o*), whatever doubt may of late years have been entertained to the contrary, that all decrees and orders of the court, whether final or interlocutory, also those, whether pronounced originally by the lord chancellor, or afterwards affirmed by him upon appeal or re-hearing, require to be enrolled before any appeal can be entertained against him by the House of Lords.

(*m*) House of Lords' Journ., 13th July, 1678.
(*n*) House of Lords' Journ., 24th March, 1725.
(*o*) Andrews *v.* Walton, House of Lords, February 17, 1842.

CHAP. XVII.

Effect of caveat.

A caveat, when entered, prevents the decree from being signed for one lunar month from the time when the docket of decree is left for the signature of the proper officer by the party entering the same, and after notice thereof given in case of a decree of the master of the rolls by his Honor's secretary, and of a decree of one of the vice-chancellors by the record and writs clerk, to the solicitor entering the caveat, of the docket having been presented for signature (*p*). The caveat must be entered with the secretary of decrees and injunctions, and will be of no effect unless it be prosecuted within a month from the day on which notice of its being entered was served by the party entering the same on the enrolment officer (*q*).

A bill of review can only be brought after a decree has been pronounced, and, strictly speaking, not until it has been signed and enrolled (*r*).*

Supplemental bill in the nature of a bill of review.

1. If the decree have *not* been signed and enrolled, and the party seek to reverse the same, on facts discovered since the passing of publication in the original cause, his proper course is to present a petition, accompanied with an affidavit, for liberty to file *a supplemental bill* in the *nature of a bill of review*, which application the court will grant, on the petitioner's depositing 50*l.*, as a

(*p*) Richards *v.* Wood, 2 My. & K. 621; Robinson *v.* Newdick, 3 Meriv. 13; Burnett *v.* Theobald, 1 P. Wms. 609. See Smith's Ch. Pr., 7th ed. 700.

(*q*) Pearce *v.* Lindsay, 4 De Gex & J. 211.

(*r*) Standish *v.* Radley, 2 Atk. 178.

* It lies to obtain the reversal, explanation or alteration of the decree made by the court for error in law appearing on the face of the decree, or upon some new matter which has been discovered after the decree, and could not possibly have been used when the decree was made.

security to answer whatever costs and damages may eventually be awarded to the adverse party, in case the court shall think fit to award the same at the hearing of the cause, on such supplemental matter (*s*).

Re-hearing.

Where the reversal of a decree, previous to its being signed and enrolled, is sought on error apparent, the party may present his petition of *rehearing*, and a supplemental bill for the purpose of introducing the new matter discovered since publication: in this instance, the cause will come on to be heard, upon the facts which are made the subject of the supplemental bill, together with a re-hearing of the original cause (*t*).

Bill of review.

2. If the party be desirous of reversing a decree which is already signed and enrolled, either on account of some error in law, apparent on the face of the decree (in which case there needs no application to the court) (*u*), or of some new facts discovered subsequently to the closing of evidence in the cause, he cannot have a re-hearing thereof, but he must file his *bill of review*. In the latter instance it is necessary for the party seeking his remedy to make application to the court (*x*), which is done, as in the former instance mentioned in this chapter, by petition, accompanied by an affidavit, showing the party's title, and that the new matter was not known to him at the time of pronouncing the decree, and that he could not, by reasonable diligence, have obtained a knowledge thereof at the time for closing evidence had expired, or at any period when he could have availed himself of it pending the former suit (*y*).

(*s*) Bea. Ord. 368.
(*t*) Perry *v.* Phillips, 17 Ves. 178.
(*u*) Ibid. Mitf. 84.
(*x*) Ibid.
(*y*) Young *v.* Keighley, 16 Ves. 350; Wortley *v.* Birkhead, 2 Ves. 57.

CHAP. XVII.

Difference between a re-hearing and an appeal.

The rule of evidence is widely different, whether it applies to a re-hearing or an appeal; for all the evidence which was capable of being given at the time of the original hearing having then been filed, although not actually produced, is admissible at the re-hearing (*z*); and documents which might have been produced and proved *vivâ voce* at the hearing, or any evidence which might have been used below, if not requiring new depositions, may be used (*a*), but not new evidence in general (*b*); whereas, in an appeal, that evidence only which was really given at the hearing is admissible (*c*).

The enrolment of a decree may be ordered to be vacated by the lord chancellor or lords justices on notice of motion and on good cause shown, in order to let in a re-hearing or appeal (*d*).

(*z*) Lovell *v.* Hicks, 2 Y. & C., Ex. 472; Morley *v.* Morley, 5 De Gex, M. & G. 615.

(*a*) Dan. 1367, 1368; Herring *v.* Clobery, Cr. & Ph. 251.

(*b*) Dan. 1367; Addison *v.* Hindmarsh, 1 Vern. 442; Whitworth *v.* Whyddon, 2 M. & G. 56; 14 Jur. 142.

(*c*) Lovell *v.* Hicks, *supra*.

(*d*) See Wickenden *v.* Rayson, 1 Jur., N. S. 945; Backhouse *v.* Wylde, 3 Jur., N. S. 398; 26 Law Jour. 812; Wildman *v.* Lade, 4 De Gex & J. 401, as to what would be the bad faith or surprise sufficient to vacate an enrolment.

CHAPTER XVIII.

ISSUE AT LAW, AND REFERENCE TO CHAMBERS UNDER AN INTERLOCUTORY DECREE—PROCEEDINGS IN CHAMBERS—CHIEF CLERK'S CERTIFICATE—DIRECTIONS—FURTHER DIRECTIONS—FINAL DECREE.

Judge sometimes directs an issue to try a fact, or determine a question of law.

It not unfrequently happened, after a cause had come on to a hearing, that the judge would suspend the decree, and, previous to his pronouncing judgment, direct an issue to determine a particular fact, to be tried and settled before a court of ordinary jurisdiction, or to direct a case to be stated for the opinion of a court of law on a point of law, or to direct an action to settle a mixed question of law and fact, for the purpose of rendering more complete justice between the parties, and, at the same time, of more clearly informing the conscience of the court thereupon. After the issue had been tried, and a verdict given, or the legal point settled by the court to which it was referred, or the legal rights settled in the action, and the record completed, the cause was then set down to be heard on the further directions reserved by the decree; which was done by re-presenting a petition of course, containing the order of the decree, as to the reference, the verdict, or sentence of the court of law, and praying that the cause might be set down for hearing on further directions, and costs reserved: an order was drawn up on the petition, and the cause was then set down on further directions and costs.

But by virtue of the Act 15 & 16 Vict. c. 86, ss. 61, 62, it was made no longer lawful for the court to direct a case

CHAP. XVIII.

to be stated for the opinion of any court of common law; but the Court of Chancery shall have full power to determine any questions of law which in the judgment of the said Court of Chancery shall be necessary to be decided previously to the decision of the equitable question at issue between the parties; and in cases where according to the former practice the court declined to grant equitable relief until the legal title or right of the parties seeking relief should have been established in a proceeding at law, the court may itself determine such title or right without requiring a party to proceed at law to establish the same.

Also by the Chancery Amendment Act, 21 & 22 Vict. c. 27, it is enacted, that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit to award damages to the party injured, in addition to or in substitution for such injunction or specific performance, and such damage may be assessed in such manner as the court shall direct (sect. 2). The court may also, if it see fit, cause the amount of such damages in any case to be assessed, or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the court itself (sect. 3). Damages may also be assessed or questions of fact tried before the court itself without a jury (sect. 5). By the subsequent act, 25 & 26 Vict. c. 42, the court *shall* determine all questions of law or fact arising in a suit for equitable relief; but the jurisdiction of the court in regard to relief is not extended. And the court may, if it think the matter can better be tried there, direct an issue to try it at the assizes.

These Acts do not give the court any fresh equitable jurisdiction, but only a legal jurisdiction. And, as the court had no power to try the validity of a will as against the heir, who was *entitled* to an issue, he is still entitled to the issue, but the court has now legal jurisdiction to *try* the issue. The court cannot decide the case, if the heir resists, on the evidence at the hearing or even if no evidence, and the heir is entitled to costs. See cases *ante*, as to establishing a will.

Where the Court of Appeal on an interlocutory motion suggests that the cause is a proper one to be heard before the vice-chancellor with the assistance of a common-law judge, the vice-chancellor has still the power (25 & 26 Vict. c. 42, s. 5), and will make an order to that effect on motion (*a*).

Even before the passing of the 21 & 22 Vict. c. 27, the court had an inherent jurisdiction to award damages for the non-performance of an agreement which they were empowered to enforce; for if a purchaser had recourse to equity and it appeared that the vendor had since the commencement of the suit against him sold the estate to another person, the court could not give him damages; but if, pending a suit for specific performance, the vendor had sold *part* of the property, as, for instance, stone in a quarry, the court would see that the purchaser had full compensation for the damages (*b*). And now the suit will not be entertained unless, irrespective of the question of damages, the court has jurisdiction (*c*).

Bill retained to determine party's right at law.

As before observed (p. 476), the court will sometimes, on the hearing of the cause, direct the bill to be retained

(*a*) Hughes *v.* Chester and Holyhead Railway Company, 8 Week. Rep. 337.

(*b*) Nelson *v.* Bridges, 2 Beav. 239; Daniels *v.* Davidson, 16 Ves. 249; Sug. V. & P. 233.

(*c*) Morg. Ord. 262.

CHAP. XVIII.

for a certain time, giving the party whose interests are disputed liberty to bring his action for the purpose of ascertaining his rights at law; and, when the *legal* right is once established before the proper jurisdiction, the Court of Chancery will, thereupon, give such *equitable* relief to the party in whose favour the verdict was given, as he shall be found to be entitled to.

Matter must be tried according to rules of law.

When, at the hearing of a cause, the bill is retained for a year, with leave for the plaintiff to bring such an action as he may be advised (*d*), the party having to establish his legal right by the action proceeds to do so according to the rules of law; and this court looks only at the final result, and not at any of the proceedings at law: nor is the party entitled, on the equity reserved, to a greater relief than was given him at the hearing. But when an issue suit is tried, for the purpose of satisfying the conscience of the court, there the court may look at the nature of the proceedings which may have taken place at the trial at law.

Where an issue before the court, or before the court and a jury, is directed, the question of fact shall be reduced into writing in the form set forth in the schedule to the Ord. XLI. r. 26. If an issue is directed to be tried at the assizes the order states the question of fact, and directs a summons to be sued out of one of the superior courts under 8 & 9 Vict. c. 109 (*e*).

Certain accounts directed to be taken before hearing.

Under the Orders in Chancery, 9th May, 1839 (*f*), where it appears that certain preliminary accounts and inquiries must be taken and made, before the rights of the parties to the cause can be ascertained, or questions arising therein can be determined, the plaintiff may, at any time after the defendant's appearance, upon motion

(*d*) Smith *v.* Lord Effingham, 2 Law Times, 61.
(*e*) See Set. Ord. 975.
(*f*) Order 5th; 20 Cons. Ord.

with notice, obtain an order, referring it to the master (which would now be to the chief clerk), to make such inquiries, and to take such accounts, without prejudice to any question in the cause, provided it appears to the court that the same will be beneficial to any party to the cause, who may not be able to consent thereto, and that the same is consented to by any of the defendants who are competent to consent, but who have not yet put in their answer to the bill, and that the same is consented to by, or as proper to be made upon, the statements contained in the answers of any of the defendants who may have answered the bill (*g*).

What matters were referred to the master.

The most usual reference after an interlocutory decree was to a master in chancery; but the points which formed the subject of such a reference are too numerous and diversified to be stated here,—the matters upon which inquiries were directed to be made before the master and noted to the judge at chambers or his chief clerk, by virtue of the 15 & 16 Vict. c. 80 (the Masters in Chancery Abolition Act), being almost as multifarious as the questions which are made cognizable in the court itself, and mainly depending upon the position in which the parties are placed at the hearing, the circumstances involved in each particular case, and the consequent direction of the court in respect thereof. The principal subjects however for which applications are to be made at chambers are, under the above Act, for time to plead, answer, or demur; for leave to amend bills or claims; for enlarging publication;* for the production of documents; applications re-

(*g*) These inquiries must not be such as would involve the decision of the questions at issue in the cause, and all parties interested must be in a position to be bound by the results. Morg. Ord. 469.

* This ought to be read in connection with sect. 38 of the 15 & 16 Vict. c. 86, and Ord. 32, 7th August, 1852, which is based upon that section; and it will be seen, that instead of an application for en-

CHAP. XVIII.

lating to the conduct of suits or matters—as to the guardianship and maintenance of infants—on matters connected with the management of property—and on such other matters as each such judge may from time to time see fit, or as may from time to time be directed by any general order of the lord chancellor (sect. 26).

As to the Course of Proceeding at Chambers.

Any of the judges in equity, when sitting in open court, may adjourn for consideration in chambers any matter which in the opinion of such judge may be more conveniently disposed of there; or, when sitting in chambers, to direct any matter to be heard in open court which they may think ought to be so heard (sect. 27).

This provision will greatly tend to obviate the delay and expense of drawing up an order and getting it passed and entered at the registrar's office. Such also is the object of sect. 32 of the Act.

The mode of proceeding before the respective judges at chambers will be by summons, or, as near as may be, according to the form now adopted by the judges of the superior courts of common law when sitting at chambers (sect. 28); which form of summons is set out in the schedule K. to Cons. Ord.

By sect. 29, sole power is given to the judges (subject to any rules which may be made by the lord chancellor with the advice and assistance of them or any two of them) to order what matters and things shall be investigated by their chief clerks, either with or without their direction, during their progress, and what matters and

larging publication, it ought to be, "an application to enlarge the time for closing the evidence." This latter practice is intended as a substitute for the former, as the evidence will no longer be kept a secret. *Vide* 19 Cons. Ord. r. 13.

things are to be heard and investigated by themselves: and in particular, if the judge shall so direct, his chief clerks shall take accounts, and make such inquiries as have usually been prosecuted before the chief clerks of the present masters. And the judge is to give such aid and directions in every or any such account or inquiry as he may think proper, but subject to the right provided for the suitor in sect. 33 to bring any particular point before the judge himself.

The object of the Legislature, as before hinted at, in passing this Act, was by one vigorous measure to remedy that fearful expenditure of the suitor's property and time, in a lengthened chancery suit, by at once sweeping away the causes of it. No theorist can well imagine the almost interminable disasters to individual suitors on account of the proverbial delays and vexatious proceedings in the masters' office, arising from references, reports, exceptions to reports, etc., which however are now to be obviated by making the entire suit to be worked out by the judge himself before whom the cause is set down, and assisted by the chief clerk—who is to aid him during the progress of the suit, not in any judicial capacity but in that of practical detail. The chief clerk does not therefore take the place which the master formerly occupied in relation to the judge, whom he assisted both in a judicial as well as a mechanical character; for the latter is only intended to be exercised by the chief clerk, whilst the former is merged in the judge himself (see also sect. 37).

Each chief clerk shall, for the purpose of any proceedings directed by the judges to be taken before him, have full power to issue advertisements to summon parties and witnesses, to administer oaths, to take affidavits and acknowledgments (other than acknowledgments by married women), to receive affirmations, and, when so directed by

CHAP. XVIII.

the judge to whose court he is attached, to examine parties and witnesses, either upon interrogatories or *vivâ voce*, as such judge shall direct (sect. 30); and parties and witnesses so summoned neglecting to attend shall be liable to process of contempt, in like manner as parties or witnesses are now liable thereto in case of disobedience to any order of court; and for any wilful and corrupt false swearing or affirming shall be liable to the same penalties, punishments and consequences as if it had been sworn and affirmed before any person now by law authorized to administer oaths, to take affidavits, and to receive affirmations (sect. 31).

No particular form is required for the directions to be given by any of the judges to the chief clerk touching any proceeding before him; but the result of such proceedings shall be stated in the shape of a short certificate to the judge, and shall not be embodied in the formal report unless the judge shall so direct; and when the judge shall approve of such certificate or report, he shall sign the same in testimony of his adopting it (sect. 32).

The practitioner will easily perceive the effect of this clause, which is to sweep away all those almost interminable state of facts and evidence which had hitherto been characteristic of the master's report; for all the proceedings and statements of facts being before the court itself, there will be no necessity for further information in the shape of a report.

No exceptions are to be taken to any certificate or report of the chief clerk, although signed or adopted by the judge; but any party may, either during the proceedings before such chief clerk, or within such time after such proceedings shall have been concluded and before the certificate or report shall have been signed and adopted as the lord chancellor shall by any general order direct, be at liberty to take the opinion of the judge upon

any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding when it is brought by the chief clerk to a conclusion (sect. 33).

This section must be read in connection with the 29th section. The importance of these two provisions in the Act will not at first sight appear except to the experienced practitioner. He will at once perceive the great improvement here intended to be introduced, namely, that whenever a particular question should arise upon taking an account or an inquiry whose decision may influence and determine the manner in which the remainder of either the inquiry or the account ought to be taken, the judge himself may dispose of such question, instead of the former tedious and expensive process of taking the whole account of the whole inquiry. It was this strange practice which formed one of the crying grievances of the masters' office. The applications under this section are made by motion, or more usually by summons, which is heard by the judge in person in chambers, but is sometimes adjourned into court.

When any certificate or report of the chief clerk shall have been signed and adopted by the judge, the same shall be filed in like manner as reports were filed, and shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied either at chambers or in open court, according to the nature of the case, upon application by *summons* or *motion* within such time as shall be prescribed in that behalf by any general order of the lord chancellor; but the court is empowered at any time to open such certificate or report, upon the same or the like grounds as any report of a master which had been absolutely confirmed might have been opened (sect. 34).

The 13th, 14th and 15th sections of the 3 & 4 Will. IV.,

which empowers the masters to make orders for time to answer, for leave to amend bills, and to enlarge publication, are repealed (sects. 26 and 35). And all the powers, authorities, and jurisdiction given to the masters by any Act then in force are to be exercised by the judges (sect. 36). And, further, the powers given to the masters by sects. 7, 8, and 9 of this Act may be exercised by the judges with respect to causes, matters and things which may be depending before them respectively in chambers; and if any such judge shall be of opinion that any cause, matter, or thing so depending ought to be finally disposed of, unless the parties, or some of them, can show good cause to the contrary, he shall direct the same to stand in his paper in open court, giving such notice thereof, if any, as he shall deem right, and proceed to dispose thereof accordingly (sect. 37).

Power is given to the lord chancellor, with the consent and advice of the other equity judges, or any two of them, to issue general rules and orders for regulating the times and form and mode of procedure before the judges sitting at chambers and their respective chief clerks; and generally the practice of the court in respect of the matters to which this Act relates; and for regulating the fees and allowances to solicitors of the court in respect to such matters, and also the fees to be payable by suitors of the court to the officers thereof in respect of the business to be conducted before the judges sitting at chambers and their respective chief clerks; and all such rules and regulations may be from time to time rescinded, altered, varied or added to by the like authority, and are to take effect as general orders of court. And it is provided that no greater amount of fees is to be payable by the suitors in respect of such business than is now paid in respect of similar and analogous business in the masters' offices (sect. 38).

Sect. 40 enables the respective judges sitting at chambers to receive and act upon the opinion of conveyancing counsel, in actual practice, with regard to such matters wherein the masters had hitherto been in the habit of requiring such opinion for their aid in the investigation of the title to an estate, with liberty for any party to object to such opinion when he shall deem it open to objection, and thereupon the point in dispute shall be disposed of by the court or by the judge sitting in chambers (*h*).

By sect. 41, the lord chancellor is empowered to nominate no less than six conveyancing counsel, of not less that ten years' standing, in actual practice, to be such conveyancing counsel for the purposes mentioned in sect. 40.

Any judge may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to assist him in any matter at issue in any cause or proceeding, and to act upon the certificate of such persons (sect. 42).

Sect. 60 allows the lord chancellor six weeks after he has resigned to deliver to the registrar a written judgment when he has already fully heard the case.

The several chancery judges have recently agreed to and adopted the following resolutions as to chamber practice:—

The following are the applications to be made at chambers, viz.:

1. As to the guardianship of infants (except the appointment of guardian *ad litem*).
2. For the appointment of special guardian to concur in a special case—but such applications and those for the appointment of a guardian *ad litem* are now made by motion in open court.

(*h*) *Re* Caddick, 20 Law Times, 59.

3. As to maintenance or advancement of infants, and to allow a ward of court to go out of the jurisdiction or marry.
4. Under the Drainage Act (8 & 9 Vict. c. 56).
5. For the administration of estates under the Act of 15 & 16 Vict. c. 86.
6. Under the Legacy Duty Act for payment of money out of court where the fund does not exceed £300 cash or stock.
7. For time to plead, answer, or demur, except when the time has already expired—when the application must be by motion.
8. For leave to amend bills, or to file a supplemental answer.
9. For enlarging publication or the time for closing evidence.
10. For the production of documents.
11. Relating to the conduct of suits or matters.
12. As to matters connected with the management of property.
13. For payment into court of purchasers' moneys under sales of the court, and investing the same.
14. For stop orders where the assignor and assignee concur.
15. Applications for renewals of leases (*i*).
16. References authorized by a private Act to be taken before a master in chancery (*k*).
17. In cases of arbitration to appoint an umpire under "The Common Law Procedure Act, 1854" (*l*).
18. Applications under 10 & 11 Vict. c. 96, "An Act for better securing Trust Funds and for the Relief of Trustees," and the 12 & 13 Vict. c. 74, "An

(*i*) Beckford *v.* Chalker, 1 Eq. Rep. 236; 21 Law Times, 192.
(*k*) Thornhill *v.* Thornhill, 18 Jur. 31; Week. Rep. 459.
(*l*) 17 & 18 Vict. c. 125, s. 12.

Act for the further Relief of Trustees," in all cases where the trust fund does not exceed 300*l.* cash or 300*l.* stock.

19. Applications under "The Trustee Act, 1850," and 15 & 16 Vict., "An Act to extend the Powers of the Trustee Act, 1850," in all cases where any decree or order shall have been made by the court for the sale or conveyance of land.
20. By executors or administrators for protection and administration under 13 & 14 Vict. c. 35, ss. 19—25, and the 23 & 24 Vict. c. 38, s. 14 (*m*).
21. Under Order, 5th Feb. 1861, to take evidence *vivâ voce* at the hearing.
22. Applications for payment to any person of the dividends or interest of any stocks, funds or securities standing to the credit of any cause or matter depending to the separate account of such person.
23. For special orders for taxation or reviewal of taxation.
24. For appointment of new trustees of charities and other relief relating to charities.
25. By mortgagors under "The Mortgage Debenture Act, 1865," for discharge of their incumbrances by a company, and for a receiver in default of payment.
26. For transfers of suits from a county court or to a county court.
27. For divers orders as to the conduct of a suit in chambers, and the procedure in chambers under decrees.
28. Respecting the management of property—as to re-

(*m*) The order *may* be made on summons *or* on motion or petition of course, 23 & 24 Vict. c. 38, s. 14. But, as a rule, applications which can be made by motion or petition *ex parte* and of course, must not be made in chambers.

ceivers when once appointed—inspection of mines in the course of a suit—as to a sale in a partition or other suit, infants being concerned, (but see Partition Act, 1868)—as to the allowances out of income of property in litigation which is more than sufficient for the claims thereon in such suit (15 & 16 Vict. c. 86, s. 68)—for change of investments—for directions under Infants Settlement Act or Settled Estates Act—for leases and management of estates in litigation by trustees parties to the suit—for registration or sale under The Land Transfer Act.

29. Applications on behalf of infants under the statute 1 Will. 4, c. 65, ss. 12, 16 and 17, in all cases where the infant is a ward of court, or the administration of the estate of the infant or its maintenance is under the direction of the court.

Advertising for creditors, etc., general and peremptory.

There is generally in the ordering part of the decree a direction to advertise. This is done for the purpose of inducing creditors to come in and prove their debts within a certain time, or for the heir-at-law or next of kin to prefer their respective claims in chambers.

It will be seen, by referring to the 28th section of the 15 & 16 Vict. c. 80, that one object of the Act was to introduce the practice of summons as a mode of proceeding before the judges at chambers; this method was accordingly directed to be henceforth adopted by the Orders of Chancery, 16th Oct. 1852. The summonses are twofold —the one is general, and relates to all the proceedings at chambers, whether originating at chambers or not; and the other is of a more special character, and has reference only to the issuing advertisements and summoning witnesses.

The practice is now governed in the main by the Consol. Orders. As these Orders point out the new proceedings which are adopted in lieu of the former business in the masters' office, and are intended to supersede the cumbrous and dilatory machinery of warrants, objections, exceptions, etc., they will best convey their own meaning by being set out verbatim and according to their numerical order.

Cons. Ord. 35—*Summons.*

2. The summons for the purpose of proceedings before the master of the rolls and vice-chancellors respectively at chambers, whether originating in chambers or not, may be in a form similar to the form set forth in Schedule (K), No. 1, with such variations as the circumstances of the case may require.

3. The administration summons, under the stat. 15 & 16 Vict. c. 86, ss. 45 and 47, may be in a form similar to the form set forth in Schedule (K), No. 2, with such variations as the circumstances of the case may require.

4. The summons to be issued under sect. 30 of the Act of 15 & 16 Vict. c. 80, may be in a form similar to the form set forth in Schedule (K), No. 3, with such variations as the circumstances of the case may require.

5. A seal is forthwith to be provided for the chambers of the master of the rolls and each of the vice-chancellors, and summonses are to be prepared by the parties, and sealed by one of the clerks, at the chambers of the judge from whose chambers they are issued, and a copy of such summons is to be left at the judge's chambers by the party obtaining such summons.

6. In cases of applications under 15 & 16 Vict. c. 86, ss. 45 and 47, applications for guardianship and maintenance of infants originating in chambers, and all other applications originating in chambers, a duplicate of the summons is to be filed in the record and writ office; and

CHAP. XVIII.

in cases where service is required, the copies served are to be stamped in the manner provided by 15 & 16 Vict. c. 86, s. 46.

7. In cases where proceedings originate in chambers, the original summons is to be served seven clear days before the return thereof. All other summonses, not being summonses referred to in the fourth rule of this Order, are to be served two clear days before the return thereof.

8. In cases where proceedings originate in chambers, and where from any cause the summons may not have been served upon any party seven clear days before the return thereof, an indorsement may be made upon the summons and upon a copy thereof stamped for service, appointing a new time for the parties not before served to attend at the chambers of the judge; and such indorsements are to be sealed at the judge's chambers, and the service of the copy so indorsed and sealed is to have the same force and effect as the service of an original summons; and where any party has been served before such indorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed.

9. In all cases where proceedings originate in chambers, the parties served are, before they are heard in chambers, to enter appearances in the record and writ office, and give notice thereof.

10. Where any of the parties summoned to attend the judge in chambers fail so to attend, whether upon the return of the summons or at any time appointed for the consideration or further consideration of the matter, the judge may proceed *ex parte*, if, considering the nature of the case, he think it expedient so to do.

11. Where the judge has proceeded *ex parte*, such proceeding shall not in any manner be reconsidered in the judge's chambers, unless the judge, upon a special application made to him for that purpose by a party who was

absent, shall be satisfied that he was not guilty of wilful delay or negligence. And in such case the costs occasioned by his non-attendance shall be in the discretion of the judge, who may fix the same at the time, and direct them to be paid by the party or his solicitor before he shall be permitted to have such proceeding reconsidered, or make such other order as to such costs as to such judge may seem meet.

Orders and Directions applicable to all cases, whether originating in Chambers or not.

[Every decree or order for an account of the personal estate of a testator or intestate shall contain a direction for an inquiry what parts (if any) of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct (Ord. 33, r. 14).

Where by any decree or order, whether made in court or in chambers, any accounts are directed to be taken, or inquiries to be made, each direction shall be numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number, and such order may be in the form set forth in Schedule (D), with such variations as the circumstances of the case may require (Ord. 33, r. 15).

In taking any account directed by any decree or order, all just allowances shall be made, without any direction for that purpose in such decree or order (Ord. 33, r. 16).]

12. Where an order is made directing an account of debts, claims, or liabilities, or an inquiry for next of kin or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, are to be excluded from the benefit of the order.

[Where an order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest is to be computed on such debts, as to such of them as carry interest, after the rate they respectively carry; and as to all others, after the rate of four per cent. per annum, from the date of the order (Ord. 42, r. 9).

A creditor, whose debt does not carry interest, who comes in and establishes the same before the judge in chambers, under a decree or order of the court or judge in chambers, shall be entitled to interest upon his debt, at the rate of four per cent. per annum from the date of the decree or order, out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest (Ord. 42, r. 10).

Where a decree or order is made directing an account of legacies, unless otherwise ordered, interest is to be computed on such legacies after the rate of four per cent. per annum, from the end of one year after the deceased's death, unless any other time of payment or rate of interest is directed by the will, and in that case according to the will (Ord. 42, r. 11).]

13. Where an order is made directing any property to be sold, unless otherwise ordered, the same is to be sold with the approbation of the judge to whose court the cause or matter is attached, to the best purchaser that can be got for the same, to be allowed by such judge, and all proper parties are to join therein as such judge shall direct (*n*).

[Where an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed is first to give security, to be allowed by the judge to whose court the cause is attached, and taken

(*n*) As to the conduct of such sale (which is usually entrusted to plaintiff), see Morg. Ord. 548.

before an officer or agent of the court in the country, if there shall be occasion, duly to account for what he shall receive on account of the rents and profits, for the receipt of which he is to be appointed, at such periods as such judge shall appoint, and to account for and pay the same as the court shall direct, or, as the case may be, to be answerable for what he shall receive in respect of the personal estate, for the getting in and collection of which he is to be appointed, and to account for and pay the same as the court shall direct; and the person so to be appointed is to be allowed a proper salary for his care and pains in receiving such rents and profits, or, as the case may be, to have an allowance made to him in respect of his collecting such personal estate (Ord. 24, r. 1; 16th Oct. 1852, Ord. 13).]

[The judge shall fix the days upon which the receivers shall (annually or at longer or shorter periods at his discretion) leave and pass their accounts, and also the days upon which such receivers shall pay the balances appearing due on the accounts so left, or such part as the chief clerk shall certify as proper to be paid by them. And with respect to such receivers as shall neglect to leave and pass their accounts and pay the balances thereof at the times so to be fixed for that purpose as aforesaid, the judge before whom such receivers are to account shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries therein claimed by such receivers, but also charge them with interest after the rate of £5 per cent. per annum upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such receivers (Ord. 24, r. 2 (*o*)).

(*o*) See further as to receivers the remainder of this Ord. 24, rr. 3 and 4, *post*. And also r. 23 of Ord. 35, *post*.

[The general orders of the court with respect to receivers shall, *mutatis mutandis*, apply to receivers appointed under orders made after these rules and regulations come into operation.

[Recognizances which have been heretofore given to the master of the rolls and the senior master in ordinary are hereafter to be given to the master of the rolls and the senior vice-chancellor for the time being (Ord. 42, r. 13).]

14. In all cases where matters, in respect of which summonses have been issued, are not disposed of upon the return of the summons, the parties are to attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter.

15. In all cases of proceedings in chambers under any decree or order, the solicitor prosecuting the same shall leave a copy of such order at the judge's chambers, and shall certify the same to be a true copy of the decree or order as passed and entered.

16. Upon a copy of the decree or order being left, a summons is to be issued to proceed with the accounts or inquiries directed; and upon the return of such summons, the judge is to be satisfied by proper evidence that all necessary parties have been served with notice of the decree or order; and thereupon directions are to be given as to the manner in which each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken; and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied or added to as may be found necessary.

17. Where by any decree or order a deed is directed to

be settled by the judge in chambers, in case the parties differ about the same, a summons to proceed shall be issued; and upon the return of such summons the party entitled to prepare such deed shall be directed to deliver a copy thereof, within such time as the judge shall think fit, to the party entitled to object thereto; and the party so entitled to object shall be directed to deliver to the other party a statement in writing of his objections (if any) within eight days after the delivery of such copy; and the proceeding shall be adjourned until after the expiration of the said period of eight days.

18. If, upon the hearing of the summons to proceed, it shall appear to the judge that, by reason of absence, or for any other sufficient cause, the service of notice of the decree or order upon any party cannot be made, or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such service; or may, at his discretion, order any substituted service, or notice by advertisement or otherwise, in lieu of such service.

19. If, in the prosecution of the decree or order, it shall appear to the judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly; or, if desired by any party, may direct the same to be considered in open court.

20. Where upon the hearing of the summons to proceed, or at any time during the prosecution of the decree or order, it appears to the judge with respect to the whole or any portion of the proceedings that the interests of the parties can be classified, he may require the parties constituting each or any class to be represented by the same solicitor, and where the parties constituting such class cannot agree upon the solicitor to represent them, the judge may nominate such solicitor for the purpose of the proceedings before him; and where any one of the parties constitut-

ing such class declines to authorize the solicitor so nominated to act for him, and insists upon being represented by a different solicitor, each party shall personally pay the costs of his own solicitor of and relating to the proceedings before the judge with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated.

21. Whenever in any proceeding before a judge the same solicitor is employed for two or more parties, such judge may at his discretion require that any of the said parties shall be represented before him by a distinct solicitor, and adjourn such proceedings until such party is so represented.

22. Every decree or order directing accounts or inquiries to be taken or made shall be brought into the judge's chambers by the party entitled to prosecute the same within ten days after the same have been passed and entered; and in default thereof any other party to the cause or matter shall be at liberty to bring in the same, and such party shall have the prosecution of such decree or order, unless the judge shall otherwise direct.

23. In case of default by any receiver appointed by the court in leaving or passing any account or in making any payment, or in case any other proceedings pending at judges' chambers is not prosecuted with due diligence, the parties or any of them may be required to attend at chambers at a time to be appointed for that purpose to show cause why such account has not been left or passed, payment made, or other proceeding prosecuted; and thereupon such directions may be given at chambers or by adjournment in open court as shall be proper to ensure the prosecution thereof by some person interested therein and for the discharge of any receiver, and appointment of

another, and for the payment of the costs incurred by any neglect or default; or a certificate by the chief clerk of such neglect or default as aforesaid, or of any abandonment or abatement of the proceedings or otherwise according to the facts, may be made and filed without any fee being payable thereon; and after such certificate shall have been so made, unless the same shall be discharged, none of the parties shall be at liberty to further prosecute the proceeding at chambers unless and until the judge shall upon application make an order directing the same to be prosecuted, and upon such certificate becoming binding any party may apply to the court, and the court may make such order relative to costs and to relieve any party from the effect of any decree or order before made or proceeding taken which shall not have been duly prosecuted or otherwise, as may be thought proper. And for the purposes aforesaid, any party or the solicitor of the suitors' fund may be directed to summon the persons whose attendance is required, and to conduct any proceedings and carry out any directions which may be given; and the costs of the solicitor of the suitors' fund shall be paid by such parties or out of such funds as the court or judge may direct, and if any costs of the solicitor of the suitors' fund be not otherwise paid the same shall be paid out of the suitors' fund.

24. At the time any summons or appointment is obtained, an entry thereof is to be made in a book, called the "Summons and Appointment Book," stating the date on which the summons is issued or appointment made, the name of the cause or matter, and by what party, and, shortly, for what purpose such summons or appointment is obtained, and at what time such summons is returnable, and for what time such appointment is made.

25. Lists of matters appointed for each day are to be made out and affixed outside the doors of the chambers of

CHAP. XVIII.

the respective judges, and, subject to any special direction, such matters are to be heard in the order in which they appear in such lists.

26. The course of proceeding in chambers is ordinarily to be the same as the course of proceeding in court upon motions. No states of facts, charges, or discharges are to be brought in. But when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, and pedigrees and concise statements, are to be supplied for the use of the judge and his chief clerks, and, where so directed, copies are to be handed over to the other parties. But no copies are to be made of deeds or documents where the originals can be brought in, unless the judge shall otherwise direct.

27. The party intending to use any affidavit on any proceeding in chambers is to give notice to the other parties concerned of his intention in that behalf.

28. All affidavits which have been previously made and read in court upon any proceeding in a cause or matter may be used before the judge in chambers.

29. When a *subpœna* is required for the attendance of a witness, for the purpose of proceedings in chambers, such *subpœna* shall be issued from the record and writ clerks' office upon a note from the judge.

30. Where a chief clerk is directed by the judge to examine any witness, the practice and mode of proceeding is to be the same as in the case of the examination of witnesses before an examiner, subject to any special directions which may be given in any particular case.

31. The original examinations and depositions of parties and witnesses taken by or before the chief clerk, authenticated by his signature, are to be transmitted by him to the record and writ office, to be there filed ; and any party to the suit or proceeding may have a copy thereof

or of any part or portion thereof, upon payment of the proper fee.

32. All orders made in chambers, and drawn up by the chief clerks or registrars, are to be entered in the same manner and in the same office as orders made in open court are entered.

33. Where any account is directed to be taken, the accounting party is, unless the judge shall otherwise direct, to make out his account and verify the same by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and to be left in the judge's chambers.

34. Any party seeking to charge any accounting party beyond what he has by his account admitted to have received is to give notice thereof to the accounting party, stating, so far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner.

[Upon a receiver's account being left in the judge's chambers to be passed, a summons to proceed thereon is to be taken out; and the account, when passed, is to be entered by the solicitor of the receiver in books in the same manner as heretofore; but the affidavit verifying the account so passed is to refer to it as an exhibit, and not to be annexed to it.

When a receivership has been completed, the book containing the accounts is to be deposited in the record and writ office (Cons. Ord. 24, rr. 3 and 4, and 16th Oct. 1852, Ord. 31 and 32).]

35. Where advertisements are required for any purpose, a peremptory and only one is to be issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements; and any

CHAP. XVIII.

advertisement may be repeated as many times and in such papers as may be directed.

36. The advertisements are to be prepared by the party prosecuting the decree or order, and submitted to the chief clerk for approval, and, when approved, are to be signed by him, and such signature is to be sufficient authority to the printer of the *Gazette* to insert the same.

37. Advertisements for creditors or other claimants are to fix a time for the creditors or claimants to come in and prove their claims, and to appoint a day for the hearing and adjudicating thereon, and may be in a form similar to the form set forth in schedule (L), with such variations as the circumstances of the case may require.

38. Claimants coming in pursuant to advertisement are to enter their claims at the chambers of the judge in the "Claims Book," for the day appointed for hearing by the advertisement, and are to give notice thereof and of the affidavit filed to the solicitors in the cause, within the time specified in the advertisement for bringing in claims.

39. The claimants filing affidavits are not to be required to take office copies; but the party prosecuting the cause or matter is to take office copies, and produce the same at the hearing, unless the judge shall otherwise direct.

40. Where on the day appointed for hearing the claims there are any not then disposed of, an adjournment-day for hearing such claims is to be fixed; and where further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed, and directions may be given as to the mode in which such evidence is to be adduced.

41. Any claimant who has not before entered his claim, may be heard on such adjournment-day, provided he has

entered his claim and filed his affidavit four clear days prior to such day, and no certificate of debts or claims has in the meantime been made (*p*).

No. 42 is abrogated.

43. After the time fixed by the advertisement, no claims are to be received (except as before provided, in case of an adjournment) unless the judge at chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit.

44. A list of all claims allowed shall, when required by the judge, be made out and left in the judge's chambers by the party prosecuting the decree or order.

45. Where the court directs any computation of interest, or the apportionment of any fund, which is to be acted upon by the accountant-general or other person, without any further order from the court, the decree or order to be made by the court may direct such computation or apportionment to be made by one of the chief clerks attached to the court of such judge, and may direct the certificate thereof, signed by such chief clerk, to be acted upon accordingly, without the same being signed and adopted by the judge.

46. Where an account is directed, the certificate shall state the result of such account, and not set the same out by way of schedule, but shall refer to the account verified by the affidavit filed, and shall specify, by the numbers attached to the items in the account, which, if any, of such items have been disallowed or varied, and shall state what additions, if any, have been made by way of surcharge. And where the account verified by the affidavit

(*p*) By Order 27th May, 1865, "The Rules numbered 37, 38, 41, 42 and 43 of the 35th Consolidated Order are hereby abrogated in so far only as the same relate to creditors," and new rules as to advertisements for and claims of creditors are made.

CHAP XVIII.

has been so altered, that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the party prosecuting the decree or order, and shall then be referred to by the certificate. The accounts and the transcripts, if any, referred to by certificates, shall be filed therewith, but no copies thereof shall be required to be taken by any party.

47. The certificates to be made by the chief clerk to the judge shall not, except the special circumstances of the case shall render it necessary, set out the order, or any documents or evidence or reasons, but shall refer to the decree or order, documents and evidence, or particular paragraphs thereof, so that it may appear upon what the result stated in any such certificate is founded.

48. The certificate of the chief clerk to the judge may be in a form similar to the form set forth in schedule (M) to these Orders, with such variations as the circumstances of the case may require ; and when prepared and settled, it shall be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the chief clerk shall require, and shall then be signed by the chief clerk, at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers whilst the parties are present before the chief clerk, the same shall be then completed and signed by him without any adjournment.

49. The time within which any party is to be at liberty to take the opinion of the judge upon any proceeding which shall have been concluded, but as to which the certificate of the chief clerk shall not have been signed and adopted by the judge, shall be four clear days after the certificate or report shall have been signed by the chief clerk.

50. Any party desiring to take the opinion of the judge, as mentioned in the last preceding rule, shall

within four clear days after the certificate shall have been signed by the chief clerk, obtain a summons for such purpose.

51. At the expiration of four clear days after the certificate shall have been signed by the chief clerk, if no party has in the meantime obtained a summons to take the opinion of the judge thereon, the chief clerk shall submit the certificate or report to the judge for his approval, and the judge may thereupon, if he approve the same, sign such certificate or report in testimony of his adoption thereof as follows:—"Approved, this day of ."

52. The time within which an application may be made by summons or motion to discharge or vary any certificate, which has been signed and adopted by the judge sitting in chambers, shall be eight *clear* days after the filing of such certificate or report.

53. The 49th, 50th, 51st and 52nd rules of this Order shall not apply to certificates which are to be acted upon by the accountant-general without any further order. Such certificates may be signed and adopted by the judge on the day after the same shall have been signed by the chief clerk, unless any party desiring to take the opinion of the judge thereon obtains a summons for that purpose before twelve o'clock on that day. And the time for applying to discharge or vary such certificates when signed and adopted by the judge shall be two clear days after the filing thereof.

54. The 49th, 50th, 51st and 52nd rules of this Order shall not apply to certificates on passing receivers' accounts. Such certificates may be approved and signed by the judge without delay; and, upon being so signed, shall be filed and forthwith acted upon.

55. The certificate or report, when signed by the judge, with the accounts, if any, to be filed therewith, is to be

CHAP XVIII.

transmitted by the chief clerk to the report office, to be there filed.

56. Certificates of the chief clerk, made as mentioned in the 45th rule, and not required to be signed and adopted by the judge, shall be transmitted and filed in the same manner as those signed and adopted by the judge.

57. A register shall be kept of all proceedings in the judge's chambers, with proper dates, so that all the proceedings in each cause or matter may appear consecutively and in chronological order, with a short statement of the questions or points decided or ruled at every hearing.

[58. Parties attending any proceedings in chambers, without having obtained the previous leave of the judge to attend the same, are not to be allowed any costs of such attendance, unless by special order of the court or judge (Ord. 40, r. 28; 16th Oct. 1822, Ord. 55).

59. The costs of counsel attending the judge in chambers are not in any case to be allowed, unless the judge certifies it to be a proper case for counsel to attend (Ord. 40, r. 29; 16th Oct. 1852, Ord. 56).

Deposit of Deeds.

60. Where any deeds or other documents are ordered to be left or deposited, whether for safe custody or for the purpose of any inquiry in chambers or otherwise, the same are to be left or deposited in the record and writ clerks' office, and shall be subject to such directions as may be given for the production thereof (Ord. 42, r. 3; 16th Oct. 1852, Ord. 57). The course of procedure in use as to the production of documents ordered to be produced before the hearing of a cause shall extend and be applied to the production of documents ordered to be produced after the hearing of any cause or matter (Ord. 42, r. 4).]

Power of Judge.

61. All powers and authorities given to the masters in ordinary of the Court of Chancery, by any general order or orders of the court, may be exercised by the judge in chambers.

62. The power of the court and of the judge in chambers to enlarge or abridge the time for doing any act or taking any proceeding, and to give any special direction as to the course or proceeding in any cause or matter, shall not be affected by these Orders (35 Cons. Ord. rr. 3 to 62 inclusive).

SCHEDULE (K.)

No. 1.

FORM OF GENERAL SUMMONS.

In Chancery.

In the matter of John Thomas, an infant, *or*
Between Joseph Wilson . . . . Plaintiff,
and
William Jackson . . . Defendant.

Let all parties concerned attend at my chambers [in the Rolls Yard, Chancery Lane, Middlesex], *or*, [at No. , Square, Lincoln's Inn, Middlesex], on the day of , at of the clock in the noon, on the hearing of an application on the part of [*here state on whose behalf the application is made, and the precise object of the application*].

Dated this day of 187 .

JOHN ROMILLY, Master of the Rolls, *or*,
X. Y., Vice-Chancellor.

This summons was taken out by A. & B., of Lincoln's Inn, in the county of Middlesex, solicitors for

To .

The following note to be added to the original summons where proceedings originate in chambers; and when the time is altered by indorsement, the indorsement to be referred to as below.

NOTE.—If you do not attend, either in person or by your solicitor, at the time and place above mentioned [*or*, at the place above mentioned, at the time mentioned in the indorsement hereon], such order will be made, and proceedings taken, as the judge may think just and expedient.

No. 2.

FORM OF ADMINISTRATION SUMMONS.

In Chancery.

In the matter of the estate of John Thomas, late of the parish of A., in the county of B., deceased, *or*

Between Joseph Wilson . . . . Plaintiff,

and

William Jackson . . . Defendant.

Upon the application of Joseph Wilson, of Russell Square, in the county of Middlesex, Esq., who claims to be a creditor upon the estate of the above-named John Thomas, let William Jackson, the executor of the said John Thomas, attend at my chambers [in Rolls Yard, Chancery Lane, Middlesex], *or* [at No. , Square, Lincoln's Inn, Middlesex], on the day of , at of the clock in the noon, and show cause, if he can, why an order for the administration of the personal [*or*, real and personal] estate of the said John Thomas, by the High Court of Chancery, should not be granted.

Dated the day of 187 .

JOHN ROMILLY, Master of the Rolls, *or*,
X. Y., Vice-Chancellor.

This summons was taken out by A. & B., of Lincoln's Inn, in the county of Middlesex, solicitors for the above-named Joseph Wilson.

The following note to be added to the original summons; and when the time is altered by indorsement, the indorsement to be referred to as below.

NOTE.—If you do not attend, either in person or by your solicitor, at the time and place above mentioned [*or*, at the place above mentioned, at the time mentioned in the indorsement hereon], such order will be made, and proceedings taken, as the judge may think just and expedient.

No. 3.

FORM OF SUMMONS BY CHIEF CLERK.

In Chancery.

In the matter of the estate of John Thomas, late of , in the county of deceased, *or*

Between Joseph Wilson . . . Plaintiff,

and

William Jackson . . . Defendant.

The defendant William Jackson [*or* A. B., of, etc.] is hereby summoned to attend at the chambers of the master of the rolls [*or* vice-chancellor], in the Rolls Yard, Chancery Lane [*or* No. , Square, Lincoln's Inn, Middlesex], on the day of , at of the clock in the noon, to be examined [*or* to be examined as a witness] on the part of the for the purpose of the proceedings directed by the master of the rolls [*or* the said vice-chancellor] to be taken before me.

Dated this day of 187 .

A. B., chief clerk.

This summons was taken out by A. & B., of Lincoln's Inn, in the county of Middlesex, solicitors for .

SCHEDULE (D.)

FORM OF ORDERING ACCOUNTS AND INQUIRIES.

This court doth order [and decree] that the following accounts and inquiries be taken and made: that is to say,

1. An account of the personal estate, not specifically bequeathed, of A. B. deceased, the testator in the pleadings named, come to the hands of, etc.

2. An account of the testator's debts.

3. An account of the testator's funeral expenses.

4. An account of the testator's legacies and annuities (if any) given by the testator's will.

5. An inquiry what parts (if any) of the testator's personal estate are outstanding or undisposed of.

And it is ordered, that the testator's personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of the legacies and annuities (if any) given by his will.

And it is ordered, that the following further accounts and inquiries be made and taken; that is to say,

6. An inquiry what real estate the testator was seised of or entitled to at the date of his will and at the time of his death.

7. An account of the rents and profits of the testator's real estate received by, etc.

8. An inquiry what incumbrances affect the said testator's real estate or any and what parts thereof.

(*If sale ordered.*)

9. An account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances.

10. An inquiry what are the priorities of such last-mentioned incumbrances.

11. And it is ordered, that the testator's real estate be sold with the approbation of the judge, etc., etc.

And it is ordered, that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

SCHEDULE (L.)

FORM OF ADVERTISEMENT.

Pursuant to a decree [*or* order] of the High Court of Chancery, made in [the matter of the estate of , and in] a cause

against

the creditors of [*or* persons claiming debts or liabilities affecting the estate of, *or* the persons claiming to be next of kin to, *or* the heir of, *as the case may be*], late of , in the county of , who died in or about the month of , are, by their solicitors, on or before the day of , to come in and prove their debts [*or* claims] at the chambers of the master of the rolls, in the Rolls Yard, Chancery Lane [*or* of the vice-chancellor , No. , Square, Lincoln's Inn], Middlesex, or in default thereof they will be peremptorily excluded from the benefit of the said decree [*or* order].

[Monday], the day of at o'clock in the noon, at the said chambers, is appointed for hearing and adjudicating upon the claims.

Dated this day of , 187 .

A. B., chief clerk.

SCHEDULE (M.)

FORM OF CERTIFICATE OF CHIEF CLERK.

In the matter of , [*or*, Between .] [*State title.*] In pursuance of the directions given to me by the master of the rolls [*or* the vice-chancellor], I hereby certify, that the result of the accounts and inquiries which have been taken and made, in pursuance of the decree [*or* order] in this cause, dated the day of , is as follows:—

1. The defendants, , the executors of , the testator, have received personal estate to the amount of £ , and they have paid, or are entitled to be allowed on account thereof, sums to the amount of £ , leaving a balance due from [*or* to] them of £ , on that account.

The particulars of the above receipts and payments appear in the account marked , verified by the affidavit of , filed on the day of , and which account is to be filed with this certificate; except that in addition to the sums appearing on such account to have been received, the said defendants are charged with the following sums [*state the same here, or in a schedule*], and except that I have disallowed the items of disbursement in the said account numbered and .

[*Or in cases where a transcript has been made.*]

The defendants, , have brought in an account, verified by the affidavit of , filed on the day of , and which account is marked , and is to be filed with this certificate. The account has been altered, and the account marked , and which is also to be filed with this certificate, is a transcript of the account as altered and passed.

2. The debts of the testator which have been allowed are set forth in the schedule hereto, and, with the interest thereon and costs mentioned in the schedule, are due to the persons therein named, and amount altogether to £ .

3. The funeral expenses of the testator amount to the sum of £ , which I have allowed the said executors in the said account of personal estate.

4. The legacies given by the testator are set forth in the schedule hereto, and, with the interest therein mentioned, remain due to the persons therein named, and amount altogether to £ .

5. The outstanding personal estate of the testator consists of the particulars set forth in the schedule hereto.

6. The real estate to which the testator was entitled consists of the particulars set forth in the schedule hereto.

7. The defendants have received rents and profits of the testator's real estate, etc. [*in a form similar to that provided with respect to the personal estate.*]

8. The incumbrances affecting the said testator's real estate are specified in the schedule hereto.

9. The real estates of the testator directed to be sold have been sold, and the purchase-moneys, amounting altogether to £ , have been paid into court.

N.B.—*The above numbers are to correspond with the numbers in the decree.*

[*After each statement the evidence produced is to be stated as follows:*—]

The evidence produced on this account [*or* inquiry] consists of the probate of the testator's will, the affidavit of A. B. filed , and paragraph No. of the affidavit of C. D. filed .

CHAP. XVIII.

As to further directions, further consideration and costs.

By Ord. 21, r. 9, a cause may be set down for further *directions*, or on equity reserved after a trial at law had under a decree or order, by presenting a petition of course to the master of the rolls if the decree was made by him, or to the lord chancellor if the decree was made in any other court, and it will be set down and heard before the judge to whose court the cause is attached (Ord. 6, r. 5).

But where the original decree directs certain accounts and inquiries, but, instead of *reserving* further directions, it does, as is usual now, *adjourn* the further *consideration* of the cause, the hearing is merely adjourned, and the cause may, in such case, be set down by the registrar for further consideration after the expiration of eight days and within fourteen days from the time when the certificate of the chief clerk on the whole matters referred to him has been signed and adopted by the judge, and then filed merely on the written request of the solicitor of the plaintiff or party having the conduct of the cause, and after the fourteen days the cause may be set down on the written request of any party to the cause. But it will not be put in the paper until ten days after it is set down (Ord. 21, r. 10).

If, however, the cause originated in chambers, it is brought on for further consideration at the times and by the parties mentioned in the last rule, not by petition or written request, but by summons (Reg. as to business, Aug. 8, 1857, r. 18).

And if the chief clerk has not concluded his certificate upon all the matters referred to him, but has prepared at the request of any of the parties interested a separate certificate as to one or more of these matters as to which it is desirable to settle some questions as soon as possible, and to get some consequential directions—as, for instance, for the payment of debts,—the above Ord. 21, r. 10, it will

be seen, will not apply, but the parties must proceed by petition or summons (*y*), according as the cause originated by bill or in chambers, to obtain further directions on the matters.

On the hearing on further consideration the original decree and the certificate made under it must be taken as conclusive, unless, as to the latter, a summons has been taken out to vary or discharge it in the proper way by summons or motion (15 & 16 Vict. c. 80, s. 34), within eight clear days after the certificate has been signed and adopted (Ord. 35, r. 52), in which case the further consideration and application to vary will come on for hearing together if counsel is to be heard on the latter, or it is by way of motion (*z*). The certificate is not, however, binding as to the law found, but only as to the facts. Questions of law arising on the face of the certificate may be raised on the further consideration of the cause (*a*). But the court will not do anything, the result of which will be to alter or vary the original decree or order in any way (*b*); even though the result of the inquiries may be to show a case for it; but if the decree only directed accounts and inquiries, and did not determine the rights of the parties, the bill may be dismissed (*c*).

When the cause comes on again to be considered by the court upon the chief clerk's certificate for further consideration, it will generally determine the rights of the parties, and make such order as will conclude the whole

(*y*) Dan. 1237.

(*z*) Set. 55.

(*a*) Adams *v.* Claxton, 6 Ves. 226. But see Lambe *v.* Orton, 6 Jur., N. S. 61; 8 W. R. 111; in which, however, it may seem that the question really was one of fact as to whether there were facts sufficient to rebut a presumption of law.

(*b*) Pritchard *v.* Draper, 1 R. & M. 198.

(*c*) Dan. 1253.

CHAP. XVIII.

suit, including directions as to costs; but where, at the hearing for further consideration, the court sees fit before making a final decree to direct subsequent inquiries to be made at chambers, it will again adjourn the cause for further consideration until the chief clerk shall have made his further certificate, which being done, and the court satisfied therewith, a final decree will be pronounced, which can only be altered or reversed by means of a rehearing or appeal, as before observed.

Liberty to apply.

In some cases the setting down a cause for further consideration is avoided by a clause in the decree giving liberty to all parties interested to apply. Thus, where the rights of the parties immediately interested in a fund are determined by the decree, it is a final decree, and bars any further suit relative to the subject-matter. But as to persons who claim or may claim future interests, the court makes no decree; and to determine their rights when they come into possession the cause must be set down for further consideration, except for this liberty to apply, which enables them to raise the questions by applying in a summary way by motion or petition or in many cases by summons (*c*). The reservation also may be expressly of liberty to apply in chambers by summons (*d*), which greatly facilitates and reduces the costs of the application. Such liberty is constantly needed and useful where the interest of a fund is ordered to be paid to a tenant for life; for under it the parties who may be at the death of the life tenant entitled to the fund can easily apply for its distribution, and according to the titles they then make out.

Such liberty also enables the parties under a decree to apply to have divers matters settled by interlocutory orders before the chief clerk's certificate or separate cer-

(*c*) Dan. 895, 896. (*d*) Ibid.; Set. 56.

tificate is made. Without such liberty no order can be applied for which at all concludes the rights of the parties, but only collateral orders (such as an order for a receiver), which leaves the rights of the parties unaffected, and to be settled on the further consideration (*e*).

Special Case.—The statute 13 & 14 Vict. c. 35, called "Sir George Turner's Act," has already been adverted to in the Introduction, where it was mentioned generally, under what circumstances, and by whom, a special case may be brought before the court. We may now observe that with a view to obviate the expense and delay consequent upon the old rule of the court, that equity "does not deal out justice by halves, nor execute trusts partially," which sometimes rendered it impossible to reach the main point really at issue, without incumbering the suit with matters respecting which no one sought the interference of the court, the above Act was passed to enable parties concurring in a special case, and without any further pleading, to determine the question at issue, without proceeding to administer any relief consequent thereon.

By section 30 of the above Act the lord chancellor is empowered, from time to time, to make, rescind and alter general rules and orders for effectuating the purposes of the Act, and for regulating the terms and the form and mode of procedure and generally the practice of the court in respect of the matters to which the Act relates. And in the meantime and until any such general rules or orders shall be made, and in so far as the same when made shall not be applicable, the proceedings under the Act shall be governed and regulated by the provisions therein contained as far as the same extend, and in so far as the same do not extend shall as well with respect

(*e*) Cooke *v.* Gwyn, 3 Atk. 689.

to the persons who ought to be made parties to special cases as in every other respect be governed and regulated by the rules, orders and practice of the court instituted by bill, so far as the same can be applied thereto, and, subject to such general rules and orders as aforesaid, the costs of all proceedings under the Act shall be in the discretion of the court (sect. 32) (*d*).

Every such special case is entitled as a cause between some or one of the parties interested, or claiming to be so, plaintiffs or plaintiff, and the others or other of them as defendants or defendant (sect. 7). It shall also state such facts and documents as may be necessary to enable the court to decide the question thereby raised (sect. 8) (*e*).

Whenever any material point is raised upon which the evidence is doubtful, the case must state all the facts upon the subject, as the court will not act upon inferences drawn by the parties themselves (*f*).

Every special case requires the signature of all parties, and must be filed in the same manner as bills are now filed. No defendant shall be required to take an office copy thereof, but an office copy shall be taken by the plaintiff. The defendant appears to the special case in like manner as he is required in respect to a bill (sect. 10). The same counsel may sign for both plaintiff and defendant (*g*). After the special case is filed, the same effects follow, and the parties to it (*h*) are subject to the jurisdic-

(*d*) No such orders have been made.

(*e*) And it should put, in the form of questions, the points on which the opinion of the court is asked; and should raise the question of costs, unless that be already arranged.

(*f*) Domvill *v.* Lamb, 9 Hare, Append. 55.

(*g*) *Ex parte* Craig, 15 Jur. 762; 20 Law Jour. 136.

(*h*) But not any other persons interested are bound by the proceedings, and therefore all such persons if possible should be made parties.

tion of the court in the same manner as in the case of bills, and they are bound by the statements therein (sect. 11). The special case thenceforth becomes to all intents and purposes a *lis pendens*, and may be registered under the Act 2 Vict. c. 11. But until so registered, it shall not be binding on a purchaser or mortgagee without express notice (sect. 17).

Previously to setting down the case for hearing it is necessary to obtain the certificate of the record and writs clerk that it is in a fit state to be set down. Subpœnas to hear judgment are issued and served in the same manner as in the case of ordinary suits (sect. 12).

Declarations of right without relief. In a suit.

By the 15 & 16 Vict. c. 86, s. 50, the court may in a suit make binding declarations of right without granting any consequential relief. But the plaintiff must be entitled to some such relief though not insisted on (*i*). And the court will not declare as to merely legal rights (*k*); nor would the later acts giving the court power to try all questions of fact or law involved in a suit for equitable relief extend the jurisdiction of the court where no such relief is sought or given.

When the case is set down for hearing it will come on in the same order in which it is set down in the cause book. It is then argued by counsel as upon the hearing of a cause (*l*).

Under a special case.

Upon the hearing of a special case also it shall be lawful for the court to determine the questions raised

(*i*) Jackson *v.* Townley, 1 Drew. 617; 17 Jur. 643; 24 L. J. 949; Bristow *v.* Whitmore, 4 K. & J. 743; Rooke *v.* Lord Kensington, 2 K. & J. 753.

(*k*) Trustees of Birkenhead Docks *v.* Laird, 4 De G., M. & G. 732; 18 Jur. 883; 23 L. J. 457; Webb *v.* Byng, 2 Jur., N. S. 1243; 8 De G., M. & G. 633.

(*l*) Jenkinson *v.* Harcourt, 2 Week. Rep. 688; Day *v.* Day, 18 Jur. 1013.

CHAP. XVIII.

therein, or any of them, and by decree to declare its opinion thereon, and so far as the right involved therein, without proceeding to administer any relief consequent upon such declaration, which declaration shall have the same force and effect as it would have had, and be binding to the same extent as such declaration would have been, if contained in a decree made in a suit between the same parties instituted by bill (sect. 14).

There is no jurisdiction upon a special case to make binding declarations upon future rights (*m*).* Neither has the court any authority in respect to a decree for specific performance of a contract (*n*).

The court may, at any time after filing the special case and the defendant's appearance, order any document

(*m*) Greenwood *v.* Sutherland, 10 Hare, Append. 12; Garlick *v.* Lawson, ibid. 14; Burt *v.* Sturt, 1 Week. Rep. 145; Dawson *v.* Dawson, 4 L. R., Eq. 508.

* Under a bill the court may decide as to future or reversionary rights or contingencies, where that is necessary to enable it to make a present order giving relief (Gosling *v.* Gosling, 5 Jur., N. S. 910; Johns. 265); but not otherwise; Langdale *v.* Briggs, 2 Jur., N. S. 982; 20 L. J. 27; 8 De G., M. & G. 391, as to future rights; Greenwood *v.* Sutherland, 10 Hare, App. 12, as to reversionary rights; Campbell *v.* Campbell, 21 L. T. 164, as to orders to meet contingencies. As a rule, on a special case no relief can be given, and so no declaratory order as to such rights can be made; but it seems that such an order has been made where relief was in contemplation, and the remainderman wished to ascertain if he was able to maintain a suit to secure the property; Bell *v.* Cade, 2 J. & H. 122. And so a declaration has been made that it was proper and for the benefit of all persons interested that an application should be made to Parliament for leasing powers; Saville *v.* Bruce, 29 Beav. 557. And the court has allowed a special case to be amended by raising a question as to the right of the plaintiffs to commit waste, so as to give the court jurisdiction to decide as to the future interests of the defendants; Forsbrook *v.* Forsbrook, 3 L. R., Ch. 93.

(*n*) Evans *v.* Evans, 22 Law Times, 43.

which may be admitted to be in the possession of any party to such case to be deposited and produced in such manner and for such purposes as the court shall think fit (sect. 18).

Executor's accounts, &c.

The 19th section enables executors or administrators of any deceased person, after the expiration of one year from his death, to obtain an order of the court for the purpose of ascertaining the debts and liabilities affecting the *personal estate* of such deceased person, and upon satisfaction thereof to indemnify the executor or administrator in administering the assets. But now, by a more recent Act, 23 & 24 Vict. c. 38, s. 14, such order may be made immediately or at any time after probate or administration shall have been granted either by the Court of Chancery upon motion or petition of course, or by a judge at chambers by *summons*, and *after the order* made the court or judge on application of the executors or administrators by motion or summons may restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having any claim or demand upon the estate of the deceased by reason of any debt or liability due from it, upon such notice and terms and conditions (if any) as to such court or judge may seem just; and notices for creditors to come in, published in pursuance of such order, will discharge the executor or administrator under the 29th section of 22 & 23 Vict. c. 35. The other sections of 13 & 14 Vict. c. 35, provide for notice to creditors to come in and prove; for taking objections to the report of the chief clerk, which is to be absolute unless objected to within fourteen days; and as to granting, after the report, injunctions to restrain actions at law by creditors or others having claims upon the estate of deceased. And by sect. 22 of 22 & 23 Vict.

c. 35, in case any debt or liability established under the order shall not have been paid or provided for as therein mentioned the court may, upon application by motion or petition, order payment or provision to be made for them as in a suit by bill, or may direct the usual administration accounts of the debts, liabilities and personal estate. The Acts do not apply to real estate (*o*).

All orders and decrees made under the provisions of the above Act, 13 & 14 Vict. c. 35, shall be subject to rehearing, appeal and review, and may be discharged and varied in the same manner as decrees and orders in suits instituted by bill (sect. 33).

By Reg. 29th October, 1853, all appeal motions from orders on the hearing of any special case are to be set down with the appeals, and not with the appeal motion. It must be set down with the registrar's clerk at the order of course seat (*p*). Where, after a special case had been set down, a party thereto died, liberty was given to amend by making his representatives parties (*q*).

The 44th section of 15 & 16 Vict. c. 86, respecting the representation of a deceased party, is equally applicable to a special case as to a bill (*r*).

(*o*) If the order be prayed by motion or petition of course it must be mentioned to the court (*Re* Harrold, 20 L. J. 168; 16 L. T. 503), though no service or notice is requisite; but it cannot be obtained at the Rolls Office as of course (*Re* Hood, 23 Beav. 17). If by summons, some one must be served.

It is only under these acts that an executor or administrator can move to get an administration by the court in a summary way; and if he be also sole legatee or sole next of kin he can find no one against whom to file a bill for administration.

(*p*) Bythesea *v.* Bythesea, 2 Week. Rep. 677; Schroder *v.* Schroder, 18 Jur. 987.

(*q*) Ainsworth *v.* Alman, 14 Beav. 597.

(*r*) Swallow *v.* Binns, 9 Hare, Append. 47.

The manner in which the court compels obedience to its orders and decrees is regulated by the Consolidated Orders as follows:—

When any person is by any decree or order directed to pay any money, or deliver up or transfer any property, real or personal, to another, it shall not be necessary to make any demand thereof; but the person so directed shall be bound to obey such decree or order upon being duly served with the same, without demand; and process of contempt may issue accordingly to enforce performance thereof (29 Cons. Ord. r. 1).

Every person not being a party in any cause who obtains an order, or in whose favour it is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause. And every person not being a party in any cause against whom obedience to any order may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause (29 Cons. Ord. r. 2).

1. *Attachment—Serjeant-at-Arms—and Sequestration.*

When any person is by a decree or order made in any suit or matter directed to pay money or to do any other act in a limited time, and after due service of the decree or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such decree or order shall, at the expiration of the time limited for the performance thereof, be entitled to a writ or writs of attachment against the disobedient person. And in case such person shall be taken or detained in custody under any such writ of attachment without obeying the decree or order, then the person presenting the decree or

CHAP. XVIII.

order shall, upon the sheriff's return that the disobedient person has been so taken or detained, be entitled to a sequestration against his estate and effects.. And in case the sheriff shall make the return *non est inventus* to such writ or writs of attachment, the person prosecuting such decree or order shall be entitled, at his option, either to a commission of sequestration in the first instance, or otherwise to an order for the serjeant-at-arms, and to such other process as he was formerly entitled to upon a return *non est inventus* made by the commissioners named in a commission of rebellion issued for the non-performance of a decree or order (29 Cons. Ord. r. 3) (*s*).

When a person is committed or brought up by the serjeant-at-arms for breach of a decree or order, he shall not be released until he has performed the decree or order in all things that are to be immediately performed, and given such security as the court shall direct to perform the other parts of the decree or order (if any) at the future days and times thereby appointed (29 Cons. Ord. r. 4).

Commission of sequestration, from what time binding.

When a commission of sequestration is awarded, it is binding from that time, and not merely from the day on which it is executed (*t*); and the party on whose behalf the sequestration issues is entitled thereto, although the body is in custody under an attachment at the same time: but no sequestration lies till the time for the return of the attachment is out on which the body was taken (*u*); whereas, according to the practice of the common law, a

(*s*) Where *costs* are ordered to be paid, the payment may be and usually is enforced by a *subpœna* (Ord. 28), followed by attachment, unless they are ordered to be paid within a limited time. Braith. Pr. 261.

(*t*) 1 Vern. 58.

(*u*) Martin *v.* Kerridge, 3 P. Wms. 240; Const *v.* Barr, 2 Russ. 161.

plaintiff cannot have an execution against the goods of the defendant, under the writ *fieri facias*, after he has issued his *capias ad satisfaciendum* against the body of the defendant.

Priority of sequestration.

In Coulson and Gardiner (*x*), it was determined that a sequestration prevails against a prior conveyance designed to defeat it, but not against prior conveyances made *bonâ fide*, or for a valuable consideration; and in the same case it was held that sequestrations may be of copyholds as well as of other lands (*y*).

Third parties protected by examination *pro interesse suo*.

To prevent a fraudulent collusion between the party against whom the sequestration issues and another person setting up a fictitious claim, the court will allow the sequestrator to seize all property of a tangible nature, which *primâ facie* belongs to the party in contempt; and if the rights of third persons are involved in such property, they will be allowed to come in and prefer their claims, and be examined *pro interesse suo* in the lands or goods sequestered, or they may apply for leave to bring an ejectment to recover their lands.

2. *Writ of Assistance.*

Writ of assistance.

If the defendant refuse to give up possession of an estate after a decree directing him so to do, the plaintiff may obtain an order of course for a *writ of assistance* to compel him; and, under 1 Will. 4, c. 36, s. 19, where any party obstinately retains possession of lands, or other real property, after a writ of execution of a decree, or an order for delivery of possession has been duly served, and demand of possession made, and upon an affidavit of such service of the writ of execution, and of such demand made thereunder, and a refusal to comply therewith on the part

(*x*) 3 Swans. Rep. 279, n. (*a*).

(*y*) See also Marquis of Caermarthen *v.* Hawson, ibid. 294.

of the person against whom the writ is issued, the party issuing it shall be at liberty to obtain the usual order of course for the *writ of assistance* to issue, and that the intermediate writs of attachment and injunction, further commanding the party to deliver possession, or any other writ, shall be unnecessary.*

In case a person refusing to comply with the decree or order of the court be entitled to the privilege of parliament, such person cannot be attached or committed for disobedience or contempt, but must be proceeded against by an order for a sequestration *nisi*, which, on no cause being shown within the time limited by the order, is made absolute.

Under the 1 & 2 Vict. c. 110, s. 18, all decrees and orders of a court of equity by which any sum of *money* or *costs* shall be payable to any person shall have the effect of a judgment at law. The writs of *fieri facias* and *elegit* being common law writs of execution after judgment respectively, requiring the sheriff to levy the debt out of the debtor's personal or real estate, their operation is restrained to legal interests, and not to estates held in trust; and when these writs are issued in aid of a creditor in equity, they are denominated an equitable *fieri facias* or *elegit*, according as it is sought against the personal or real estate.

3. *Fieri facias—Elegit—and Venditioni exponas.*

Every person to whom in any cause or matter pending in the Court of Chancery any sum of money or any costs shall have been directed to be paid shall, after the lapse of one month from the time when the decree or order for

* The 29th Cons. Ord. r. 1, dispenses with the demand, and r. 5 with the writ of execution. Service of the decree or order is only requisite now.

payment was duly passed and entered, be entitled to sue out one or more writ or writs of *fieri facias*, or writ or writs of *elegit* (29 Cons. Ord. r. 6).

Upon every such decree or order hereafter to be entered, one of the entering clerks shall, at the request of the party leaving it, mark the day of the month and year on which the same is so left for entry; and no writ of *fieri facias* or *elegit* shall be sued out upon any such decree or order unless the date of such entry is marked thereon (29 Cons. Ord. r. 7). Such writs when sealed are to be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior courts of common law belongs, and shall be executed by such sheriff or other officer as nearly as may be in the same manner in which he ought to execute such like writs. And these writs upon their return must be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the office of the clerks of records and writs. And for the execution of such writs, the sheriff or other officer shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior courts of common law (29 Cons. Ord. r. 8).

When it appears upon the return of any such writ of *fieri facias* that the sheriff or other officer has by virtue of such writ seized but not sold any goods of the person directed to pay such sum of money or costs as before mentioned, the person to whom such sum of money or costs is payable shall, immediately after such writ with such return shall have been filed as of record, be at liberty to sue out a writ of *venditioni exponas* (29 Cons. Ord. r. 9). On every such writ of *fieri facias* and *elegit* there must be indorsed, in addition to the particulars required

CHAP. XVIII.

by the 3 Cons. Ord. rr. 2 and 5 (which relate respectively to the indorsement by the solicitor or by the party himself whenever he appears in person), the words "By the court" (*z*), and also thereunder the calling and place of residence of the person against whom such writ shall be issued; and every such writ shall be also indorsed for the sum to be levied, according to the form used upon like writs issuing out of the superior courts of common law (29 Cons. Ord. r. 10).

4. *Fieri facias de Bonis Ecclesiasticis and Sequestrari facias de Bonis Ecclesiasticis.*

When it appears upon the return of any writ of *fi. fa.*, or any writ of *elegit* issued in pursuance of the 6th rule, *ante*, that the person against whom such writ was so issued is a beneficed clerk, and has no goods or chattels, nor any lay fee in the bailiwick of the sheriff to whom such writ was directed, the person to whom the sum of money or costs mentioned in such writ is or are payable, shall, immediately after such writ with the return shall have been filed as of record, be at liberty to sue out one or more writs of *fi. fa. de bon. eccles.* or one or more writs of *sequestr. fa.* (29 Cons. Ord. r. 11). On every such writ so to be issued as before mentioned, an indorsement shall be made, in addition to the particulars required by the above rules 2 and 5 of the 3 Cons. Ord., of the words "By the court," and also thereunder the calling, if any, and place of residence, if any, of the person against whom such writ shall be issued; and every such writ shall also be indorsed for the sum to be taken or levied, according

(*z*) All process of contempt is in fact process issued under the powers of the court, whereas the subpœna commencing a suit is an order of the crown, bringing the matter within the cognizance of the court as its delegate.

to the form used upon like writs issuing out of the superior courts of common law (29 Cons. Ord. r. 12). The writ when sealed shall be delivered to the bishop, and shall be executed by him as nearly as may be in the same manner in which he ought to execute such like writs issuing out of the superior courts of common law. And such writs when returned by the bishop shall be delivered to the parties or solicitors by whom respectively they were sued out, and shall thereupon be filed as of record in the office of the clerks of records and writs. And for the execution of such writs the bishop or his officers shall not take or be allowed any fees other than such as are or shall be from time to time allowed by lawful authority for the execution of the like writs issuing out of the superior courts of common law (29 Cons. Ord. r. 13).

Of Process generally.

Every suitor who prosecutes a contempt shall use his best endeavour to procure each process to be duly served and executed upon the party prosecuted; otherwise he shall pay costs to the party aggrieved, and lose the benefit of the process returned (30 Cons. Ord. r. 1). After any order for a serjeant-at-arms shall be granted by the court, the registrar shall on request draw up the said order and deliver the same to the serjeant-at-arms or his deputy, who shall thereupon endeavour to apprehend the party prosecuted and bring him into court, to answer his contempt if he can. But if he cannot, no such order for a serjeant-at-arms shall be discharged, nor the contempt thereupon, without a certificate under the hand of the serjeant-at-arms that his fees have been paid. And after the order shall have so been drawn up and passed, no private or other agreement shall be made between the party prosecuting the contempt and the person

standing in contempt, or on their behalf, for a compromise of the suit or the discharge of the contempt, unless such satisfaction shall be made, and a certificate thereof shall be produced to the court (30 Cons. Ord. r. 2).

When a party is brought up to the court by virtue of any writ of *habeas* duly issued from the office of the clerk of records and writs, and by reason of the pressure of other business, or from any other cause, the hearing of the cause or matter in which such party is concerned is postponed to a future day, a new writ of *habeas* may be issued for such future day, if the court shall so direct, without payment of any fee (30 Cons. Ord. r. 3).

Before the 10th order, 26th Aug. 1841, and 10th order, 11th April, 1842, the manner in which the court compelled obedience to its orders and decrees was by issuing a writ of execution of the decree, then to serve a copy on the party personally, and, upon affidavit of service and of default, an attachment issued. This was followed, if deemed expedient, by a writ of proclamation, commission of rebellion, serjeant-at-arms, and sequestration. By the above orders, however, confirmed by the 30 Cons. Ord. r. 4, it is directed that no writ of execution shall be issued for the purpose of requiring or compelling obedience to any decree or order, but the person required by any such decree or order to do any act shall, upon being duly served with such decree or order, be bound to do such act in obedience thereto (*a*). And by the 6th order of the 26th Aug. 1841, no writ of attachment with proclamations, nor any writ of rebellion, shall be issued for the purpose of compelling obedience to any process, order, or decree of the court (30 Cons. Ord. r. 5).

To compel performance of a decree by a corporation.

In compelling the performance of a decree by a corporation, it is usual to issue a distringas, an alias dis-

(*a*) And see 29 Cons. Ord. r. 1, *ante*, p. 563. *Demand* is also dispensed with in cases of orders for payment of money, &c.

tringas, and an alias pluries distringas, previous to the writ of sequestration, although in some cases this formality has been dispensed with; and instead of going through the whole line of process, a sequestration *nisi* has been ordered at the return of the first distringas (*b*).

Separate property of a married woman.

According to the strict rules of the common law, a married woman could have no separate interest in property independent of her husband, the queen-consort only excepted; but courts of equity, after trusts became pretty well established, have found means to relax the strictness of the common law, by giving a married woman, through the intervention of a trustee, a power of charging or disposing of property limited to her sole and separate use, without the concurrence of her husband.

An equitable consequence of this power is the right which the court claims to enforce its decrees against a married woman, by awarding execution against her property, as well personal as the rents and profits of her real estate; but herein the court goes no further; it acts only *in rem*, but not *in personam*, and therefore cannot attach her body, but will leave it where it was placed by the common law, viz., in the power of her husband (*c*).

(*b*) Lowton *v.* Marquis of Colchester, 3 Mer. 546.

When court can act *in rem*.

(*c*) In some cases, however, the court can act *in rem*. Thus if a decree directs the execution of a deed or other instrument, or the surrender or transfer of any property, the court has power to perform the act in the name of the disobedient person. (1 Will. IV. c. 36, s. 15, r. 15.) And if the delivery or deposit of any articles is ordered the sequestrator may seize them if necessary. (Id. r. 16.) The writ of assistance is also of the same nature, and so are the orders providing for the vesting of property, or its transfer, or the execution of conveyances under the Trustee Acts.

CHAPTER XIX.

PRODUCTION OF DOCUMENTS.

One of the most important steps in the conduct of a suit is that taken to procure from the adverse party the production, before the hearing, of documents relating to the case of the party requiring it. Such production is a part of that discovery which figures so prominently in equity jurisprudence, and the power to enforce which, indeed, forms in great part the basis of equity jurisdiction. Formerly, this discovery of documents from a defendant was given by the answer, which, in reply to the interrogatories in respect thereof, was required to admit the possession or control of any documents relating to the plaintiff's case, and to set out their purport and effect or the precise words thereof. Afterwards the practice was altered, and in answer to interrogatories founded on a charge in the bill that defendant had in his possession or power divers documents relating to the matters mentioned in the bill, and whereby the truth of the plaintiff's case would appear, the defendant was obliged to admit or deny these allegations; and if he admitted having the possession or power of or over any such documents, he was compelled to *describe* them only in his answer or a schedule thereto, and the plaintiff then made a motion for their production and delivery to the clerk of the court, with liberty for plaintiff to inspect them (*a*). This dis-

(*a*) Wig. Disc., p. 199, *et seq.*

covery, therefore, could only be obtained in or after the answer. The rules regulating this discovery conformed to the general rules relating to this subject; and, therefore, defendant was only bound to produce those documents which related to plaintiff's case about to come on for trial, and as to which there were no special exemptions from the nature of the discovery by reason of the documents being privileged or their production tending to criminate the defendant, &c. (*b*). And it could only be obtained when, by the fact of answering, defendant had submitted to give full discovery and had not availed himself of any plea or demurrer to discovery. The defendant also could obtain such production, as also discovery in general, to enable him to make out his defence, but only by filing a cross bill, and not until after he had answered the original bill.

Now by 15 & 16 Vict. c. 86, "It shall be lawful for the court upon the application of the plaintiff in any suit in the said court whether commenced by bill [or by claim], and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just" (sect. 18). The following section enables a *defendant* to enforce discovery, by means of interrogatories, without filing a cross bill. And thus by sect. 20 it is enacted, that "It shall be lawful for the court upon the application of any defendant in any suit, whether commenced by bill [or by

(*b*) Wig. Disc., p. 199, *et seq.*

claim], but as to suits commenced by bill, where the defendant is required to answer the plaintiff's bill, not until he has put in a full and sufficient answer to the bill, unless the court shall make any order to the contrary, to make an order for the production by the plaintiff in such suit, on oath, of such of the documents in his possession or power relating to the matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just."

This new procedure, it will be observed, leaves it for the court to determine of what documents it is right to require the production, and does not alter the rules as to discovery. It is, however, applicable at any time (*b*), and the party need not wait for an admission in the answer to his bill or cross bill or interrogatories, and the application may be made after the hearing. The sections however say, that the production must be "on oath;" and this enables the party to put his adversary to admit on oath as to any such documents, upon which admissions he can be required to produce them. The application must be made by summons in chambers (*c*), upon which an order (*d*) is made directing the adversary, within seven days after service of the order, to make an affidavit stating what documents he has in his possession or power relating to the matters in question, and, if he objects to produce any, which documents, and the grounds of his objection, and also as to documents which formerly were and when last, but are not now, in his possession or power (*e*). And ordering him to produce and leave,

(*b*) And see Rochdale Company *v.* King, 15 Beav. 11; Parkinson *v.* Chambers, 1 K. & J. 72.

(*c*) 15 & 16 Vict. c. 80, s. 26; Notice 10th Nov. 1852.

(*d*) See Seton, 1040, as to Form of Order.

(*e*) See Form, Reg. as to Business, Aug. 8th, 1857, Sched. 3.

within seven days after filing such affidavit, the documents which he does not object to produce with the clerk of records and writs, or at the office of his solicitor (or otherwise as may be ordered), and giving leave to the applicant to inspect and peruse the same and take copies, &c.; and the documents are ordered to be produced upon any examination of witnesses in the cause and at the hearing, with further liberty for applicant to apply as to such documents.

If the application is founded on an admission in the answer, the order is direct to produce, &c., without requiring an affidavit.

The statements in the answer and affidavit cannot be questioned, nor can a party be cross-examined on his affidavit (*f*). But if the applicant is not satisfied with the objections stated in the affidavit, he must proceed by summons requiring a further affidavit, the hearing of which will be argued in chambers, and if necessary adjourned into court (*g*). No affidavit is necessary to obtain the order (*h*). If the affidavit is insufficient the applicant must proceed by summons to test its sufficiency (*i*). As the form of bill given in the Cons. Ord. contains no charge of the possession of documents, and the above practice furnishes an easy and cheap means of obtaining discovery and production of documents, the courts discourage the practice of taking exceptions to answers for insufficiency, because they contain no answers to interrogatories as to documents (*k*). Still if the bill charges that, and the interrogatories inquire, whether the

(*f*) Manby *v.* Bewicke, 8 De G., M. & G. 470.
(*g*) Set. 1047.
(*h*) Ibid.
(*i*) Lazarus *v.* Mozley, 5 Jur., N. S. 1110.
(*k*) Perry *v.* Turpin, Kay, App. 49; Barnard *v.* Hunter, 4 W. R. 34; Piffard *v.* Beeby, 1 L. R., Eq. 623; Set. 1047.

defendant possesses documents, or a particular document, proving some *particular* fact alleged, the answer must not evade the inquiry (*l*). In fact the means under the new practice of raising this specific question is *not* very speedy or simple; because plaintiff must resort to a *second* summons, and an argument in chambers, to enforce the discovery and production. The ordinary practice only corresponds to the old formal and general charge of documents and general interrogatory founded thereon.

An order for an affidavit and production, or for production only, is enforced by serving the same on the party, properly endorsed (*m*), and on disobedience by attachment and other process of contempt.

A demurrer or a plea to the whole of the discovery is a bar to any summons for production (*n*). And after a plea to part of the discovery, a motion for production could not be properly heard on the objections to the production of part of the documents until this plea was settled, and so was ordered to stand over (*o*); and the same practice would apply now for the same reasons.

Care has to be taken, in objecting to the production of any documents, to state in the affidavit that they are not material to the plaintiff's case (if he is the applicant) about to come on for hearing, but relate exclusively to defendant's case; the court, however, will not always be satisfied with such statements, but will, if the documents are admitted to be relevant, exercise its own judgment as to whether they must not or may not be also material, and look at the nature of the documents and the allegations of the answer to come to a decision (*p*).

(*l*) Marsh *v.* Keith, 9 W. R. 115; Catt *v.* Tourle, 18 W. R. 966.
(*m*) Ord. 23, r. 10; Ord. 29, r. 3.
(*n*) Set. 1052.
(*o*) Buchanan *v.* Hodgson, 11 Beav. 368.
(*p*) See more fully Dan. 1669, 1672; Morg. Ord. 176.

"The course of procedure in use, as to the production of documents ordered to be produced before the hearing of a cause, shall extend and be applied to the production of documents ordered to be produced after the hearing of any cause or matter" (Ord. 42, r. 4). And in all proceedings in chambers production of documents can be obtained on summons (Id. and 15 & 16 Vict. c. 80, s. 11). A claimant coming in under a decree is in the position of a party for the purposes of requiring, and being compelled to give, production of documents (*q*).

(*q*) See cases, Dan. 1665.

CHAPTER XX.

MOTIONS AND PETITIONS.

In a cause.

It is often necessary in the progress of a cause to apply to the court by motion or petition for divers interlocutory orders. Such applications may also be made after decree for the purpose of obtaining some relief or order consistent with the decree. All such applications are styled

In a matter.

motions or petitions in a cause. Under various statutes also, applications may be made to the court by petition or motion when no cause has been or is about to be instituted.

Difference between motions and petitions.

A petition differs from a motion in this, that it must be made in writing, stating the facts and praying relief; whilst a motion is made *ore tenus* only. Still if a motion is what is called a special motion and not a motion *of course*, notice must, as a rule, be given to the parties interested in the matter of the intention to move and the object of the motion, and then no relief will be given except that mentioned; but in some cases the courts

Ex parte motions.

permit a special motion to be made *ex parte* and without notice, and at any time (though not a motion day), if the matter be urgent, as may be the case when an injunction is required. The courts, however, do not favour *ex parte* motions, and prefer that even in urgent cases the applicant should, where that will meet the urgency, file a written copy of the bill and apply *ex parte* for leave to serve a short notice of motion with a written copy of the bill. If an *ex parte* motion is made and an order obtained on it, the court will revoke it unless all the material facts are correctly stated (*a*).

(*a*) Dan. 1441.

Special motions and petitions.

As a rule an order may be obtained on a special motion in a cause, when the cause has been recently instituted or heard, and no fresh facts are to be brought before the court. But in an old cause, or where fresh facts are to be adduced or the matter is complicated, a petition in the cause stating the case should be filed, so as to give the other parties clear notice of the case to be made (*b*).

Motions and petitions of course.

Many orders are obtained by motions or petitions of course. Such applications are not made on notice or mentioned to the judge, but are granted ministerially by the chief clerk upon the assumption that the facts are correctly stated, the applicant being then entitled to such orders under the settled practice of the court. If it is a motion of course the facts are stated in counsel's brief, which is then merely endorsed by him and is left with the registrar (*c*). Such a motion may be made at any time (*d*), and if in a cause before one vice-chancellor to any other vice-chancellor (*e*). If a petition of course is presented, it is addressed to the master of the rolls and left with his secretary (23 Cons. Ord. r. 17).

Orders of course—notice of.

Such orders of course must themselves be served on the opposite party (*f*). Though on such motions or petitions of course the facts are assumed to be correctly stated, the order made thereunder may be set aside if such assumption should turn out baseless (*g*), or any material fact has been suppressed (*h*). Long lists of the

When set aside.

(*b*) Lord Shipbrooke *v.* Lord Hinchinbrook, 13 Ves. 393.

(*c*) Hart *v.* Tulk, 18 L. J. 162.

(*d*) Lord Harborough *v.* Warnably, 1 Phil. 364; 13 L. J. 279; 8 Jur. 326.

(*e*) Magan *v.* Magan, 16 Jur. 587.

(*f*) Dan. 1439.

(*g*) Brignall *v.* Whitehead, 30 Beav. 229; 8 Jur., N. S. 183.

(*h*) St. Victor *v.* Devereux, 8 Jur. 26; Wilkin *v.* Nainby, 8 Beav. 465; 14 L. J. 402; 9 Jur. 611; Marquis of Hertford *v.* Suisse, 7 Beav. 160; Cooper *v.* Lewis, 2 Phil. 178.

CHAP. XX.

Orders of course.

orders which may be obtained on motions or on petitions of course are appended to Daniell's Chancery Practice. Generally every order which may be had by petition of course may be procured also by motion of course (*g*); but divers statutes and orders confine certain applications to one or the other of these methods. When the facts admit of dispute or qualification and the granting the order may depend on the exact facts and involve a discretionary act in the judge, the parties interested must be brought before the court by special motion or petition in the cause.

When cannot be had.

Further applications in a *matter*.

When a *matter* has been once brought before the court by special motion or petition under the statutory jurisdiction, applications in the same matter may be made, it would seem, in the same way as in a cause.

Special orders —how varied, &c.

An order made on motion may be discharged, reversed or varied on motion (*h*), but an order made on petition can only be discharged, reversed or varied by petition of rehearing, unless the application is made on the ground of irregularity (*i*). Notice of motion must be served for two clear days before some seal day—that is, the day generally appointed in every week during the sittings of the court for hearing motions—unless on account of urgency or other reason, such as the impossibility of finding out and serving the proper party, or of there being no such person to be served, special leave is obtained on motion *ex parte* to give a shorter notice or for some other than a seal day, or notice is dispensed with, or the motion is allowed to be made *ex parte*. And after the service of a bill on a defendant no notice of motion can be served on him before appearance, and before the time for appearing has expired, without special leave (Ord. 3, r. 8); and the notice to be effective against him, must state that

Special motion—notice of.

(*g*) Dan. 1453. (*h*) Dan. 1452.
(*i*) Dan. 1355, 1461.

the motion will be made by leave of the court and also that the service is by such leave (*k*), and so it must be stated in the notice whenever special leave for short service is granted (*l*). In some cases the court will give special leave to serve parties out of the jurisdiction or to effect substituted service.

Form of notice.

The notice must, as we have said, specify the order which is to be asked for, and the judge before whom it is to be made. It must be headed in the cause or matter in which it is made, and must contain at the foot a list of the affidavits filed and intended to be used at the hearing. If made in a cause or matter already before a judge of the court, the motion must be made before him and the notice must state accordingly (Cons. Ords. 6, r. 5, 6 and 33, r. 1).

Special petition—service.

A special petition must also (unless by special leave to the contrary) be served two clear days before the day appointed for hearing (34 Cons. Ord. r. 2).

Form.

It must be headed in the cause or matter in which it is made, and also generally, if a statutory petition, in the matter of the particular statute. And at the foot must be a note stating the persons (if any) upon whom it is intended to serve it; or, if no such persons, that it is not intended to serve it upon any one (Ord. 34, r. 1).

Parties to be served.

As to this matter of service it is sometimes a difficult matter to determine upon whom a notice of motion or a petition should be served. The law appears to have been in a strangely uncertain state as to whether a party unnecessarily served and appearing, or properly served but unnecessarily appearing, has any claim to his costs (*m*). But it seems very unreasonable that he should have any

Costs of parties improperly served.

(*k*) Jacklin *v.* Wilkins, 6 Beav. 607; Moggridge *v.* Thomas, 2 C. P. Cooper, R. 166.

(*l*) Hill *v.* Rimmell, 8 Sim. 632; Harris *v.* Lewis, 8 Jur. 1063; Newton *v.* Chorlton, 10 Ha. App. 31.

(*m*) See cases, Morg. & Dav. Costs, 43, 44.

CHAP. XX.

Petition—costs of parties improperly served.

costs where he has really no interest in appearing, but those of consulting whether he has any interest which he ought to appear to protect, because under the rules which restrict the relief to the terms of the notice or the prayer of the petition, he has full notice of all that can be asked or done at the hearing. It has been stated (*n*), that if a petition be presented *in a cause*, the costs of such party will generally be disallowed; but that a distinction has been made in some cases where the petition was presented *in a matter* (not a cause), because then the party had to incur the costs of consulting his solicitor whether he ought to appear, *sed qu.* (*o*); and two cases are cited to question the distinction (*p*). And by late decisions it seems that in *all* cases a person served with a petition whose interest is doubtful, or who has no interest otherwise in appearing, is entitled to appear and ask for his costs of appearance, unless the petitioner tender him sufficient for the costs of taking legal advice as to whether he is interested and ought to appear to protect his interests (*q*). This, however, does not entitle him to costs if, being thus justified in appearing to ask for his costs only, he also wrongfully opposes the application.

Motion—costs of parties improperly served with notice.

The reason for giving costs to a party served with a notice of motion is the same as if the application had been a petition, viz., that he must consult his legal advisers whether he ought to appear to protect his inte-

(*n*) Morg. Ord. 542.

(*o*) And see Morg. & Dav. Costs, 44, to same effect.

(*p*) Re Birch's Legacy, 2 K. & J. 369; Re Justices of Coventry, 19 Beav. 158.

(*q*) In re Daggan's Trusts, 8 L. R., Eq. 697 (where 40*s.* were tendered); and Wood *v.* Boucher, 6 L. R., Ch. App. 77, where the amount was said to depend on the length of the petition and other circumstances. In a later case 20*s.* was considered sufficient by V.-C. Bacon.

rests ; and, therefore, if he appears and only asks for his costs without opposing the motion, it would seem that the authority of the late cases will apply and entitle him to such costs (*r*).

Who may apply.

By motion.

A motion in a cause or matter already before the court may be made or presented by any party to the record or by a person who, by the proceedings under a decree or order, is made a party to it, such as a claimant coming in under an administration, or a purchaser of an estate sold by order of the court (*s*). A petition in a cause or matter may be presented by a person who is not a party to the record (*t*).

By petition.

Evidence.

The evidence on motions and petitions is generally by affidavit, but any party may now make use of oral evidence under 15 & 16 Vict. c. 86, s. 40, which it will be observed refers to any cause or matter, and enables a party to summon and examine a witness orally before an examiner, or cross-examine him on his affidavit with a view to any motion, petition or other proceeding in like manner as could be done for the hearing of a cause,—that is, in the presence of the parties, the examination (if any), cross-examination and re-examination following one another. And Gen. Ord. 5 Feb. 1861, r. 19, enabling the party wishing to cross-examine a witness of the opposite party on his affidavit to give such party notice in writing to produce the witness for cross-examination on pain of losing the benefit of the affidavit, applies to motions and petitions ; and the time fixed for such notice is in such cases fourteen days next after the filing the affidavit. If it is of more importance to cross-examine the witness than to shut out his affidavit, he should be *subpœnaed* under

(*r*) See Barnford *v.* Watts, 2 Beav. 202.

(*s*) Dan. 1440; and see form of order upon motion by divers of such parties, Set. 38.

(*t*) Dan. 1453.

CHAP. XX.

the 40th sect. (*above*), in the like manner as can be done with a view to the hearing. Motions and petitions, however, come on generally on such short notice, that if such examinations or cross-examinations are necessary, application must be made to the court to postpone the hearing for the purpose, and this should be done before the matter is opened (*u*), though the court can direct the case to proceed on the evidence before it, and make any interim order proper to keep the matter unprejudiced by the delay.

For the purposes of a motion, as for a motion for a decree, an answer, if any, is treated as an affidavit. And affidavits filed in a cause cannot be used on an interlocutory motion without notice (*v*). But the parties may go on filing affidavits, strengthening their respective cases, &c. in contradiction to the opposing evidence, until the matter is brought on ; but if any evidence is filed very late, or a party is taken by surprise, the court will often adjourn the matter, if necessary, upon terms to enable the parties to complete their cases, or it will admit affidavits filed after the hearing has commenced (*x*). The court is not so strict upon interlocutory applications as to enforcing the rules of evidence as upon the final hearing and decision of the merits (*y*).

Not so strict on interlocutory applications as at the hearing.

Motions—hearing.

Upon the hearing of a motion, as has been said, the relief will be limited by the terms of notice, unless by consent, and the court will not make an order thereupon which will decide the principal point in a cause, unless by consent (*z*). It often, however, in the case of an injunc-

(*u*) Smith *v.* Swansea Dock Company, 9 Ha. App. 20; 16 Jur. 1130.

(*v*) Cauty *v.* Holditch, 14 Sim. 75.

(*x*) East Lancashire Railway Company *v.* Hattersley, 8 Ha. 86; Electric Telegraph Company *v.* Nott, 11 Jur. 273.

(*y*) See Dan. 1448.

(*z*) Dan. 1448.

tion, does virtually—though not in form—decide such question finally, and thereby really ends the case; and (*a*) by consent an interlocutory motion which raises the merits is sometimes turned into a motion for a decree, and is, by leave, set down at once for hearing as a motion for decree, and decided as such at once on the seal day. Sometimes all that is done at the hearing is to make an order under which the matter is finally settled in chambers (*b*); or the whole matter may be adjourned into chambers and there disposed of (*c*). The order may also be absolute or *nisi*, that is, a particular act is to be done unless the other party shall, within a certain time, show cause to the contrary, when, if no cause is shown, the party obtaining the order may, after the expiration of the time limited, move again, without notice, to make the order absolute (*d*). It would also appear, by 15 & 16 Vict. c. 80, s. 29, that the judge may order any *matter* or part of a matter brought before him to be investigated by his chief clerk; and then he must adjourn the further consideration of the motion to some certain day or generally.

Order of hearing.

Motions are heard, in general, according to the seniority of counsel (*e*).

Petitions—order of hearing.

Petitions are *set down* for hearing by the secretary of the judge, and a list thereof is sent by him to the registrar to be put in the paper of petitions for the day, and they are called on in their regular order (*f*).

(*a*) Dan. 1449.

(*b*) See the case of an appointment of a receiver and also of an order under 13 & 14 Vict. c. 35, s. 14, made on a motion of course.

(*c*) 15 & 16 Vict. c. 80, s. 27; and see *post* as to hearing on petitions.

(*d*) Dan. 1442, 1443.

(*e*) See, as to order, Dan. 1446.

(*f*) Dan. 1457.

CHAP. XX.

Petition—hearing.

On the hearing of the petition, the applicant is limited by the allegations and prayer thereof; but the court will sometimes allow errors or omissions to be there rectified or supplied when that cannot be to the prejudice of absent parties.

Order on.

The court may, as on a bill, direct inquiries and accounts in chambers, and then a certificate of the chief clerk will be made, upon the production of a copy of which the petition will be put by the registrar in the paper again for further hearing or consideration in open court, and a further order will then be made. But to avoid the expenses attending a formal certificate, and such further order and attendance in court, the judge may at once, under 15 & 16 Vict. c. 80, s. 27, adjourn the whole *matter* for consideration in chambers, if of opinion that it may be more conveniently disposed of there, and in that case a summons is afterwards taken out to proceed on the petition or other application in chambers, and the order upon it is made there without coming back into court (*f*). If the petition (or other matter) is adjourned into chambers for inquiry, and to be afterwards brought on to be disposed of in court, a formal certificate is not made, but a minute of the result is annexed to the judge's copy of the petition, and sent to the judge in court, and a note of the evidence taken is made by the chief clerk on the fold of the petition for the registrar, and the petition will be put by the registrar in the paper for further hearing (*g*). The course of adjourning the whole matter into court is usually adopted, on petitions for payment of money out of court, where the evidence is complicated, or the persons claiming are numerous, and sometimes also in other cases (*h*).

(*f*) Dan. 1209; Set. 48; and for a form of such order see Set. 1106.

(*g*) Set. 48, 49; Dan. 1209.

(*h*) Set. 48, 49.

Petitions standing over generally, or adjourned for further consideration, are brought on again by being restored by the registrar to the paper, which he will do upon being satisfied that the object (if any) of the adjournment is satisfied, and upon the written request merely of the party having the conduct of the proceeding (*i*). Notice must be given (*j*). If the applicant does not make his motion or ask to have it saved before the court has disposed of the motions on the day appointed, it is an *abandoned* motion, and no fresh motion to the same effect can be made till the costs of the abandoned motion, which may be applied for on such or the next seal day, are paid (*k*). But if a petitioner does not appear to support his petition when called on, the respondent, upon production of an affidavit, showing he has been served, may ask to have it discharged with costs (*l*) ;—the petitioner, however, may appear before the petitions are disposed of.

Petitions standing over.

Where applicant does not appear to support a motion.

— to support his petition.

If on the hearing of a petition or motion the other parties do not appear, the court will dispose of the application in their absence on proof by affidavit of the service of the petition or notice of motion.

Where party does not appear to oppose motion or petition.

Orders made on petition or summons are enforced in the same manner as orders and decrees in causes.

Enforcing interlocutory orders.

(*i*) Set. 48; Reg. Reg., March 15, 1860.
(*j*) Dan. 1458.
(*k*) Dan. 1446, 1450.
(*l*) Dan. 1458.

CHAPTER XXI.

SUING AND DEFENDING IN FORMA PAUPERIS—COSTS.

Qualification to sue *in formâ pauperis.*

A PERSON swearing that he is not worth five pounds after all his debts are paid, his wearing apparel, and that which forms the subject of the suit (provided it be not in his possession) only excepted, will be allowed to prosecute or defend his right without incurring the same degree of costs which all other suitors are liable to (*a*); and for this purpose the person, whether plaintiff or defendant, upon a petition being presented to the master of the rolls, accompanied with an affidavit, together with counsel's certificate, that he has a just cause of suit, may obtain an order to sue *in formâ pauperis*, and the court will thereupon allow him counsel and a solicitor. But, with respect to the certificate of counsel, we must observe that, although it be required in the case of a plaintiff, it is considered unnecessary on behalf of a defendant pauper.

This indulgence in favour of pauper plaintiffs is adopted by courts of equity from the practice of the common law courts under the provisions of a statute, 11 Hen. 7, c. 12. Courts of equity, however, have always granted such indulgence to defendants who on account of poverty are incapable of defending suits; and an order to defend *in formâ pauperis* will be made in favour of a defendant upon his making a similar affidavit in reference to his circumstances

(*a*) Allen *v.* M'Pherson, 5 Beav. 469; Davies *v.* Nixon, 11 W. R. 62.

as would be required in the case of a plaintiff. And it would seem that defendants brought into court, whether they wish it or not, were so privileged when pauper plaintiffs were not (*b*).

No fee or reward to be taken by counsel or solicitor to pauper.

After a person is admitted to sue as a pauper, no fee or reward must be taken of such party by any counsel or solicitor, nor any contract or agreement be made for any recompense or reward afterwards, under pain of contempt of the court; and the party so suing or defending as a pauper shall be from thenceforth dispaupered, and not be admitted again in that suit to sue or defend *in formâ pauperis* (7 Cons. Ord. r. 9): neither may the counsel or solicitor refuse their assistance to the pauper, unless they can satisfy the court that they have good reason for their forbearance (7 Cons. Ord. r. 10): but this privilege does not exempt him from paying for the labour of writing (*c*).

Affidavit of suitor's poverty must be made by himself personally.

The affidavit of the suitor's poverty must be made by himself, and not a third person (*d*); and the affidavit of a defendant that he is not worth more than five pounds, except the matter in question, will not entitle him to defend *in formâ pauperis* when he appears to be in possession of land which forms the subject of litigation (*e*).

A person not to sue as a pauper in *autre droit*.

A person suing or defending as a pauper can only do so in his own right, because the indulgence intended to poor persons, not of ability to sue for or defend their claims, extends only to persons suing in their own rights and not in *autre droit*, as an executor or administrator (*f*); and if a person is both executor and legatee,

(*b*) Dan. 152, quoting Lord Bacon's Orders.

(*c*) Beam. Ord. Ch. 215 and 216; 3 Cons. Ord. r. 10.

(*d*) 1 Dick. 136; Wilkinson *v.* Belcher, 2 Bro. C. C. 272.

(*e*) Spencer *v.* Bryant, 11 Ves. 49.

(*f*) Paradice *v.* Shepherd, 1 Dick. 136; Oldfield *v.* Cobbett, 1 Phil. 613.

he must have a special order to sue or defend as a pauper, lest under colour of his beneficial interest he should obtain *dives* costs without being liable to costs (*g*); but a guardian appointed under statute 1 Will. IV. c. 36, s. 9, to a person confined for contempt, being an idiot, lunatic, or *non compos mentis*, may, under the discretion of the court, defend *in formâ pauperis*.

Next friends of infants and married women.

A distinction has generally prevailed in a court of equity as to the circumstances and responsibility of the next friend of a married woman and that of an infant: in the former case a married woman, being an adult, may choose whom she will to act for her in that capacity; whereas an infant, who has no such power, would be wholly unprotected if it were stringently held that his *prochein ami* must of necessity be a man of substance. Moreover, the court is anxious that questions which concern infants should be brought under its notice, and by virtue of its jurisdiction over suits by infants will stay them if improperly instituted (*h*); but the court has no such jurisdiction in respect to suits on behalf of a married woman (*i*); besides she may be permitted to sue *in formâ pauperis* without a next friend, where she cannot find a responsible one (*j*). The next friend of a *feme covert* must therefore be in such circumstances as to be able to give security for costs, whilst a pauper may sue on behalf of an infant (*k*).

(*g*) Thompson *v.* Thompson, 1 Turn. & Ven. 513; Everton *v.* Matthews, 3 W. R. 159; Parkinson *v.* Chambers, 3 W. R. 34.

(*h*) Pennington *v.* Alvin, 1 S. & S. 265; Fellows *v.* Barratt, 1 Keen, 119; Murrell *v.* Clapham, 8 Sim. 74.

(*i*) Wilton *v.* Hill, 2 De G., M. & G. 807.

(*j*) Page *v.* Page, 1 W. R. 117; 16 Beav. 588; *Ex parte* Hakewill, 5 De G., M. & G. 116; *Re* Foster, 18 Beav. 525.

(*k*) Hind *v.* Whitmore, 27 Law Times, 55; 2 K. & J. 458. See also S. Smith's Eq. Pr. 177 and 779, 6th edit.

Where, however, an infant of the age of twenty years made an affidavit that he was not worth 5*l.*, and applied to be allowed to sue *in formâ pauperis* by his next friend, who was also a pauper, but it did not appear by the affidavit that he could not procure a suitable person to act as his next friend, an *ex parte* order allowing him to sue by his next friend *in formâ pauperis* was discharged with costs: although it would have been otherwise if the affidavit had stated that he could not get any one but a pauper to act as his next friend (*l*).

Punishment of pauper in instituting a vexatious suit.

If a pauper file an improper bill he may be committed; and the court will order him to be dispaupered where his conduct has been gross and vexatious (*m*). And we have instances upon record where a pauper plaintiff has been ordered to be whipped for filing an improper bill (*n*), and if, after having commenced the suit as a pauper, he becomes of ability to sue, the court will order him to be dispaupered: so also, if it appear that he is in the possession of such property that he ought not to sue *in formâ pauperis*, as where he is in possession and receives the rents of the lands in question,—although the defendant may be entitled to take possession under a verdict at law. But a charity fund, raised for the purpose of enabling a pauper to conduct his suit, is not a ground for dispaupering him (*o*).

Plaintiff or defendant pauper only allowed pauper costs.

A party suing or defending *in formâ pauperis* will only be allowed what are termed *pauper* costs, viz. so much as he is proved, upon oath, to have been out of pocket (*p*);

(*l*) Lindsey *v.* Tyrrell, 30 Law Times, 238; 2 De G. & J. 7; 24 Beav. 124; 3 Jur., N. S. 1014.

(*m*) Pearson *v.* Belcher, 4 Ves. 629; Wagner *v.* Mears, 3 Sim. 127.

(*n*) Spence, Eq. Juris. 690, n. (*g*); *supra*, Gresley's Evid. in Ch. 151 (*a*); 2 Ed. by Calv.

(*o*) 16 Ves. 407.

(*p*) 2 Eq. Ca. Ab. 633.

CHAP. XXI.

but there are some cases where they will be taxed as *dives costs*, *i. e.* as the costs of a party not suing *in formâ pauperis*.

No fixed rule as to *dives* and *pauper* costs.

Lord Eldon, in the case of Rattry *v.* George (*q*), in giving his opinion upon the matters of pauper and dives costs, considers that there was no fixed rule upon the subject, but that it was discretionary in the court, according to the merits of the case. Thus, where the defendant put in an answer to a pauper's bill, which answer was reported impertinent, he decided that the costs of expunging the impertinence should be taxed as *dives* costs, and, when taxed, to be paid into court; so when a plea and demurrer was put in to a pauper plaintiff's bill, which was overruled, the court ordered the costs to be taxed against the defendant as dives costs, upon the principle that the counsel and solicitor do not give their labour to the adverse party, but to the pauper (*r*).*

Although the Court of Chancery exercises its discretion in awarding costs, yet there are certain rules and principles by which its decisions are governed in respect to them.

Stat. 17 Ric. II. c. 6, as to costs.

The jurisdiction of the court in giving costs appears to be derived from the stat. 17 Ric. II. c. 6; and, in the

(*q*) 16 Ves. 232.

(*r*) 1 Eq. Ca. Ab. 125.

* By 40 Cons. Ord. r. 5, where costs are ordered to be paid to a party suing or defending *in formâ pauperis*, such costs are to be taxed as *dives* costs, unless the court shall otherwise direct. Under 1 Will. 4, c. 36, s. 15, and 23 & 24 Vict. c. 149, where a defendant in custody for contempt for want of an answer, counsel and solicitor may be assigned to him, and the costs of putting in his answer and making his defence or protecting his interests be ordered to be paid out of the suitors' fee fund.

exercise of its power to decree costs, it has respect not only to the different kind of suits, but also to the claims of certain individuals who may happen to fill responsible and gratuitous characters.

Principles upon which costs are awarded, and their necessary consequence.

As a certain amount of expenses must necessarily be the result in all kinds of litigation, the main object of the court is the proper adjustment of such expenses, so as to make them fall on the party who appears in justice and morality bound to discharge them. And thus the court of equity is said to have adopted two general principles in giving or withholding costs,—the *remuneration* of the successful party, and the *punishment* of the party who fails in the suit; although these terms must not always be understood in their strict and ordinary sense: for notwithstanding the principle of punishment may in some instances appear to be the main object, and that of the remuneration in others, they are in most cases but relative terms, the one involving in itself the consequences of the other. For example, a mortgagee files his bill of foreclosure: now, although in ordinary cases he is allowed his costs, yet if he misconduct himself in the progress of the suit, or, being a defendant, sets up a groundless defence, he is deprived of them; in the former instance repayment is the chief object, in the latter punishment, without regard to the defendant, the mortgagor—although he (without its being the main object of the court) would be affected in respect to costs, as a necessary consequence of the conduct or misconduct of the mortgagee; in other words, he would necessarily be benefited in a pecuniary sense equal to the amount of such costs (*s*). Again, the general rule respecting trustees is, that they, conducting themselves fairly, shall be entitled

(*s*) Beames on Cos. Intr.; Moore *v.* Painter, Rolls Court, July 5, 1842.

CHAP. XXI.

to their costs; yet, where a trustee has been guilty of fraud or vexatious conduct, or otherwise misbehaves himself, he shall pay costs (*t*); on the one hand the remunerative principle comes into operation, on the other the punitory principle, both in the strictest sense of the word. In another case, where a trustee had sold out stock and purchased land with the produce, even though the court went so far as to observe that the breach of trust did not discredit him, as he thought he might lay it out upon land, yet it directed him to replace the stock in such a manner as not to gain by the transaction, and to pay costs (*u*).*

It will therefore be seen from these two examples, that, although the court may order costs to be paid by a party, yet it does not always follow that they are paid upon the strict punitory principle; for the trustee in the latter instance could not be fixed with the imputation of a moral wrong.

Costs not to be regarded in the light of punishment.

Thus has the law been sometimes stated; but it is not now held to be correct. The court does *not* award costs against a party by way of punishment or penalty; but merely as a necessary consequence of a party having caused a litigation in which he has failed (*x*), in which case he ought in justice to recoup his adversary the costs to which he has been put. The case of a mortgagee is peculiar—whether plaintiff or defendant, his security entitles him to repayment of his money free from all deductions, and this

(*t*) Henley *v.* Phillips, 2 Atk. 48; Lowson *v.* Copeland, 2 Bro. C. C. 156; Buxton *v.* Buxton, 1 My. & Cr. 40; Thorby *v.* Yeats, V.-C. K. Bruce's Court, March 19, 1842; *Re* Wylly's Trusts, 8 Week. Rep. 645; 6 Jur., N. S. 906.

(*u*) Earl Powlett *v.* Herbert, 1 Ves. jun. 297.

* *Vide* the Trustee Relief Act, 10 & 11 Vict. c. 96, *ante*, p. 279.

(*x*) Dan. 1260 *et seq.*; Lord Cranworth in Clarke *v.* Hunt, 6 H. L. Ca. 633; 5 Jur., N. S. 447, 453; Wortham *v.* Lord Dacre, 2 K. & J. 437, 438; Purser *v.* Darby, 4 K. & J. 41.

will he get, unless his conduct has made the litigation necessary, that is, when he has used his security for other purposes than was intended. Even where a plaintiff having otherwise good cause of suit, bases his suit also upon charges of fraud upon which he fails, he will only have to bear the costs thus occasioned (*y*); but for simplicity's sake, no costs may be given on either side. And if either party has by his improper or negligent conduct occasioned the litigation he loses his claim to recompense of his costs: and so if he has been guilty of misconduct or harsh or vexatious conduct or laches before the suit or in its prosecution. Where both parties have been guilty of misconduct leading to litigation, they lose the claim to costs from one another. And now even in hard cases the courts incline to follow the rule (*z*) that costs follow the event. But as between parties not adverse, it is a general rule, that the party "eased by the institution of the suit, or who has the exclusive benefit of it, should pay the costs" (*a*). Even in cases of notorious frauds the court, finding the difficulty of carrying out an order for defendant to pay exemplary costs, has ceased to make such orders (*b*).

And where the suit is for the benefit of all parties, the principle of remuneration does not apply, unless some of them wrongfully resist and cause expenses. Thus, in a suit for partition, which is generally considered to be for the benefit of all parties (*c*), no costs are given until the commission; and then the costs of issuing, executing, and confirming the commission, and of the subseqent pro-

(*y*) Baker *v.* Bradley, 7 De G., M. & G. 608; Wright *v.* Howard, 1 Sim. & Stu. 190; Blest *v.* Brown, 10 W. R. 569; 8 Jur., N. S. 602; Jones *v.* Ricketts, 10 W. R. 576.

(*z*) See Bartlett *v.* Wood, *post*, p. 598, for this rule.

(*a*) Morg. & Dav. Costs, 73—76.

(*b*) Dan. 1260 (*n*), *et seq.*; Waltham *v.* Broughton, 2 Atk. 43.

(*c*) See arguo. in Metcalf *v.* Beckwith, 2 P. Wms. 377.

ceedings, are borne by the parties in proportion to the value of their interests (*d*). So also, when a purchaser in a suit for specific performance of the contract has raised such an objection to the title as to form the subject of a reasonable doubt, even in the mind of the court, which made it a fair contest down to the hearing, in this case, although the objection be overruled, yet it will be without costs (*e*).

Costs as between *party and party*, or *solicitor and client*.

When costs are awarded by the court, they are either as between *party and party*, or as between *solicitor and client*, the latter being the more liberal, the former including only those which would ordinarily be incurred in the prosecution or defence of the suit. See 40 Cons. Ord. r. 32, as to what is to be allowed on taxation of *party and party* costs.

When "costs," simply speaking, are directed to be paid, it signifies costs as between party and party.

Costs as between party and party may be defined as those which one litigant party is usually ordered to pay to another; those between solicitor and client are such as each litigant party would, on taxation, be bound to pay to his own solicitor.

Costs as between party and party are generally given where the rights of all parties are adverse. Costs as between solicitor and client are ordered in cases where the respective parties are interested in one common fund, in proportions to be determined by the court, or to trustees or executors in suits for the administration of estates. And in suits for administration, trustees, executors, and administrators are not only entitled to their costs as be-

(*d*) Agar *v.* Fairfax, 17 Ves. 533 *et seq.*; Morg. & Dav. Costs, 172, 173.

(*e*) Cox *v.* Chamberlain, 4 Ves. 631; Aislabie *v.* Rice, 3 Madd. 260; and see exceptions where the point of law is new, Morg. & Dav. Costs, 76.

tween solicitor and client, but also to *their costs, charges and expenses* properly incurred in the execution of the trust or the administration of the estate—and they will be included under the term "*just allowances*" usually employed in an administration decree (*f*). In contested cases not relating to the administration of estates, the costs are usually taxed as between party and party, and even a mortgagee's costs of suit are taxed as between party and party, unless a special case is made for more liberal costs, or for costs, charges and expenses, and they are ordered.

By the 15 & 16 Vict. c. 86, s. 42, r. 7, in suits by the said section authorized for administration of trusts or the estates of intestates, the court may make such order as it may deem just for placing the defendant on the record on the same footing as to costs as other persons having a common interest with him in the matters in question.

In a creditor's or legatee's suit the question whether the costs are taxed between party and party or solicitor and client, depends upon the sufficiency of the fund to pay the debts or legacies. If the fund be insufficient, they are taxed as between solicitor and client, on the principle that all the fund then belongs to the creditors or legatees. On the other hand, if the fund be more than sufficient, they are in such case taxed as between party and party, as the costs in that case come out of the fund of parties adverse to those in whose interests the suit has been instituted (*g*).

In Brodie *v.* Bolton (*h*), where in a creditor's suit a

(*f*) Hood *v.* Wilson, 2 R. & M. 687; Brodie *v.* Bolton, 3 M. & K. 168; Thomas *v.* Jones, 6 Jur., N. S. 301; 20 L. J. 570; 8 W. R. 328; Jenkins *v.* Robertson, 22 L. J. 874; Waldron *v.* Frances, 10 Ha. Ap. 10.

(*g*) See cases, Morg. & Dav. 136.

(*h*) 3 M. & K. 168.

CHAP. XXI.

fund had been realized by the diligence of the plaintiff, and the assets were more than sufficient for the payment of the debts, Lord Langdale, M. R., considering it a hardship that creditors, not parties to the suit, should come in and reap the benefit of it without contributing to the plaintiff's extra costs, made an order by which it was directed that the plaintiff's costs as between party and party were to be paid out of the fund, and that his extra costs should be paid *pro ratâ* by all the creditors who partook of the benefit of the suit (*i*).

Costs generally paid by the unsuccessful party.

Although the Court of Chancery, under and by virtue of the statute 17 Ric. II., before noticed, is empowered to award costs according to its own discretion, yet they must in general be paid by the unsuccessful party, unless he can show the existence of circumstances sufficient to induce the court to withhold them (*k*); and in the exercise of its discretion it will also, according to the justice of the case, either apportion the costs between the several parties, or throw them upon particular estates or funds (*l*).

Legatee.

Where a bill is filed by a legatee for the payment of his legacy, he is considered as suing on behalf of the other legatees also, and generally will have his costs out of the testator's assets, and certainly will have them if there is any difficulty caused by the manner in which the testator has framed his will, or if testator's affairs are left in such a condition that a general administration is necessary; and an admission of assets by the executor sufficient to pay the legacy, which renders a general administration unnecessary and entitles the plaintiff to an order for payment of the legacy at once, entitles him to costs also, if

(*i*) Stanton *v.* Hatfield, 1 K. 358. See Gaunt *v.* Taylor, 2 Hare, 420.

(*k*) Vancouver *v.* Bliss, 11 Ves. 458; Bartlett *v.* Wood, 30 L. J. 614; 9 W. R. 817; 4 L. T., N. S. 692.

(*l*) Besevi *v.* Serra, 14 Ves. 313.

such suit was rendered necessary by the conduct of the executor (*m*).

The costs in an administration suit of all proper and necessary parties are paid out of the assets in the first instance before distribution, that is, if the suit was rendered necessary by the form of the will of the deceased or the circumstances of his property or his dying intestate (*n*); and no costs ought to be given out of the estate except for those proceedings which are in their origin reasonably directed for the benefit of the estate, or the parties interested therein, or which have in their result conduced to that benefit (*o*). But an executor has a right to have his accounts taken before the court for his protection (*p*), and to file a bill or take other proceedings as previously explained for that purpose at the expense of the estate.

The costs of instituting an inquiry respecting a specific legacy will be ordered to be paid out of the testator's estate, and the reason assigned is, that it would otherwise abridge the specific legacy (*q*).

Account.

In a suit for an account, the unsuccessful party will in general be decreed to pay costs if a balance is, contrary to his contention, found due from him; but the costs depend upon whether the whole balance claimed or a substantial part of it is found due (*r*). If a defendant wrongfully refuses to account, or disputes his liability to account, he pays costs up to and including the hearing; but the costs of taking the accounts under a decree will

(*m*) Morg. & Dav. Costs, 111, 112.
(*n*) *Id.* 109, 110.
(*o*) Bartlett *v.* Wood, *supra.*
(*p*) White *v.* Jackson, 15 Beav. 191.
(*q*) Nesbitt *v.* Murray, 5 Ves. 149.
(*r*) Morg. & Dav. Costs, 107, citing May *v.* Biggenden, 24 Beav. 207, 214.

depend upon whether the defendant in his answer has given accounts, and the plaintiff who persists in his suit after the answer, succeeds or not in showing that such accounts are not substantially correct (*s*). An executor or trustee ought to give an account without suit, and if refusing may have to pay the costs of an administration suit or a suit for an account (*t*).

Where an issue has been directed, the successful party generally allowed his costs.

The court having directed an issue, the party in whose favour it is found is generally allowed the costs of trying it. But it is otherwise in the case of an heir-at-law, who, where a bill is filed against him to have the trusts of the will carried into execution, and an issue to try the validity of the will, is allowed his costs, both of the suit and the issue, although the issue be found for the devisee. If however the heir does not depend solely upon his common law rights, but improperly and without reasonable ground sets up the insanity of the testator or other objection, and fails, he shall not have his costs of the issue, though he will have his costs of the suit unless he has been guilty of tampering with the will, or other vexatious or improper conduct, in which case even costs may be given against him, though as a general rule no costs can be given against him (*u*). The court of which the heir-at-law is

Heir-at-law—entitled to costs.

(*s*) See cases, Morg. & Dav. Costs, 107, 108.

(*t*) Kemp *v.* Burn, 4 Gif. 348; Wroe *v.* Seed, 4 Gif. 425; Springett *v.* Dashwood, 2 Gif. 521.

(*u*) See Tuthill *v.* Scott, 2 Moll. 468; Waters *v.* Waters, 2 W. R. 642; Roberts *v.* Kerslake, 1 K. & J. 751; Grove *v.* Young, 5 De G. & S. 38, and other cases cited; Morg. & Dav. Costs, 242—245—where however, White *v.* Wilson is incorrectly cited, the point there being that the heir *not* "wickedly or fraudulently" contesting the will, but only without reasonable ground, had no costs of the issue but only his costs of suits; and so the later case of Stacey *v.* Spratley, 4 De G. & J. 199; and see Summerell *v.* Clements, 32 L. J. (N. S.) Prob. 33; 3 Swab. & T. 35; Cutchell *v.* Cutchell, 32 L. J. (N. S.) Prob. 108; 3 Swab. & T. 41; Williams *v.* Henry, 33 L. J. (N. S.)

a favourite thus interferes on his behalf, by reason of the frail and imperfect mode of examining into facts, and considers that the heir has a right *ex debito justitiæ*, upon being brought into a court of chancery in order that a will may be established against him, to demand an issue to see whether he be disinherited or not (*x*). But the court in such cases will exercise a discretion; therefore it has been held that an heir-at-law defending *in formâ pauperis*, in a suit to establish a will, was under the circumstances entitled only to pauper costs (*y*). An heir-at-law *suing* to set aside a will, is, however, in a different position, and "in modern times the inclination of the court has been to place the heir-at-law in the same situation as other parties as to costs" (*z*).

Neither an infant nor *feme covert*, who sue by their next friend, are liable to costs; but the next friend who institutes the suit on their behalf is liable to pay the costs. Where, however, a suit has been commenced on behalf of an infant, and he proceeds with the suit after he has arrived at the age of twenty-one years, he makes himself liable for the whole costs (*a*). Costs at law cannot be set off against costs in this court (*b*). As between the infant and the next friend, the latter will be entitled to his costs and just allowances, unless the suit was improperly instituted, when the next friend must pay them himself. The propriety of the suit does not depend on

Neither an infant nor feme covert are liable to costs, but their next friend.

Prob. 110; 3 Swab. & T. 471; that a next of kin unsuccessfully opposing probate for undue influence and incapacity not ordered to pay costs if he has reasonable ground for the opposition, and costs may even be ordered to him out of the assets if the conduct of testator or executor justifies it.

(*x*) White *v.* Wilson, 13 Ves. 91.

(*y*) Stafford *v.* Higginbotham, 2 Keen, 147.

(*z*) Swinfen *v.* Swinfen, 27 Beav. 148.

(*a*) 1 Str. 708.

(*b*) Sainter *v.* Ferguson, 14 Law Times, 217.

CHAP. XXI.

its success, but upon whether it was instituted with a fair intention to benefit the infant or secure and protect his interests (*c*).

As to costs of a trustee.

In the case of a trustee and next friend, against whom no improper conduct can be alleged—although usually they are allowed their costs as between party and party, yet the court will go further—when a trustee, in the fair execution of his trust, has expended money, by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his trust; in such and the like cases, he is not only entitled to his costs, but also to his charges and expenses, under the head of just allowances. And, in the case of an infant, as he himself cannot incur charges and expenses, Lord Eldon thought that the next friend ought to be allowed them under just allowances; for persons would deliberate a considerable time before they accepted that office, were the next friend to be at the whole expense of the infant beyond his costs (*d*).

The same doctrine was also recognized in an earlier case (*e*); for although upon an application to the court that certain expenses should be repaid, under the head of just allowances, Lord Thurlow, looking at the circumstances, said he could not make the order for fear of the precedent, yet, as the mother of the infant would have been allowed her costs under the head of just allowances, if she had been an accounting party (for example, a receiver), and had paid an agent whom she employed to collect the rents, he would put it in the same shape, and allow the payment of the expenses incurred as *a payment made by the mother*. And, in another case (*f*), when

(*c*) Morg. & Dav. 249, 250.
(*d*) Fearns *v.* Young, 10 Ves. 184.
(*e*) Stewart *v.* Hoare, 2 Bro. C. C. 263.
(*f*) Taner *v.* Iver, 2 Ves. sen. 465.

the master had reported the bill to have been a proper one, the *prochein ami* of an infant was allowed his costs, notwithstanding the bill was in its result dismissed with costs, there having been no laches or misbehaviour in carrying on the suit.

Costs of a relator.

Although a relator be made a necessary party to an information and bill, respecting a charity fund, in order that there may be some one to answer the costs in case the information be improperly filed, yet, generally, if persons in this office conduct themselves properly, or have been the means of benefiting a charity, they will be allowed their costs (*g*). And, where a question arose respecting the residue bequeathed by will to charitable purposes, the costs of all parties, the next of kin, the executor and the attorney-general, were directed to be paid out of the fund, as between solicitor and client (*h*); and in some cases he has his costs, charges and expenses incurred to enable him to institute and prosecute the suit and preparatory thereto (*i*). In cases of charitable bequests also, the heir-at-law, "not having made an improper point," has been permitted to have his costs as between solicitor and client (*j*).

Reasons why costs are not usually claimed against trustees, etc.

The court of equity, in exempting from costs guardians, trustees and executors, as well as others who voluntarily take upon themselves the onerous responsibilities attached to their fiduciary character, when in ordinary circumstances they would have to pay the costs, or in directing their costs to be paid out of the estate in their hands, when in any other capacity they would not be entitled to costs, have proceeded purely upon the principle of remu-

(*g*) Attorney-General *v.* The Brewers' Company, 1 P. Wms. 376; Osborne *v.* Binne, 7 Ves. 424.

(*h*) Moggridge *v.* Thackwell, 7 Ves. 36.

(*i*) See cases, Morg. & Dav. 140, 141.

(*j*) Curie *v.* Pie, 17 Ves. 462.

neration ; since, if the court did not interfere to compel persons not in a position to assert their own rights, and who are incapable of instituting proceedings for themselves, to discharge a duty towards others who have voluntarily undertaken their cause, and which in conscience they are bound to perform in return for such gratuitous interference, few persons would be found willing to yield any assistance to others in a cause, however worthy, which, in the result, might expose them to a certain loss without the least chance of any benefit resulting to themselves.

Costs of suit generally ascertained by taxing master.

Although, in some instances, the amount of costs is ascertained and awarded according to the established and fixed practice of the court, yet the costs of a suit are generally ascertained by the taxing master ; and when his certificate of the amount of costs is filed they are recoverable by a subpœna and attachment, as formerly, and now by a *fi. fa.*, and *elegit*, under the 1 & 2 Vict. c. 110.

Where a party decreed to pay costs dies before taxation.

If a party, who by a decree is directed personally to pay the costs, dies *before taxation*, and there remains nothing else to be done under such decree, the obligation to pay the costs dies with him, since the court will not allow a suit to be revived for the sake of costs alone, unless they are to be paid out of an estate (*k*), although they have been actually awarded before the suit became abated ; nor can such costs be taxed pending the abatement : they are, therefore, lost to the party to whom they have been awarded, — which rule is generally admitted to be much complained of (*l*). But, if the costs were actually taxed before the party's death, which would thus render them in the nature of liquidated damages, or there remained, in addition to the payment of costs, anything further to be

(*k*) 1 Dick. 16; Jenour *v.* Jenour, 10 Ves. 572.

(*l*) Lee *v.* Lee, 1 Hare, 617; Law Jour., N. S. 26; Oldfield *v.* Cobbett, 20 Beav. 563.

executed in the decree, which would in itself require a bill of revivor to complete it; in such case, notwithstanding the party dies before taxation, the suit may be revived for costs; which Lord Hardwicke, in the case of Kemp *v.* Mackrell (*m*), said, he always held to be a hard rule and a very nice distinction, since the right to costs is the same before taxation as after, only the *quantum* has not been ascertained (*n*).* CHAP. XXI.

(*m*) 2 Atk. 114.

(*n*) See the recent decision upon this subject, in Andrews *v.* Lockwood, 16 Jur. 278; 7 Law Times, N. S.; and the same case upon appeal, 10 Law Times, 301; but see also Robertson *v.* Southgate, 18 Law Journ. 404.

* See later cases on this subject, Morg. & Dav. 384, 385, confirming the text. Viewing this rule, indeed, at first sight, in connection with its practical results, it is difficult to imagine how it can proceed from that equity which "delighteth in equality." In most cases it operates so severely as to prove the cause of regret to the court itself, and induces the judges, whenever an opportunity occurs, to exert their ingenuity in finding out exceptions, for the sake of mitigating its hardship. This part of the doctrine relating to costs is however based upon the technical principle which directs them to be paid as a punishment by the unsuccessful party: therefore, as it is a personal demand, the action dies with him. This frequently occurs where a sole plaintiff, against whom there is a decree with costs, or where the bill is dismissed against him for want of prosecution, dies before taxation. The suit may have been most wantonly commenced, and vexatiously conducted; in the course of which the defendant may have been put to very grievous expenses: for, having been duly served with a printed copy of the plaintiff's bill, he must either meet it by appearance and answer, or incur the costs and inconvenience of committing what is called a contempt of court. The result of the suit, however, shows that the plaintiff had no equity, and he is therefore ordered to pay all the costs of his unjust proceeding. But a day or two before taxation the plaintiff dies, and thus all the expenses which the defendant has incurred by being brought before the court, and protecting himself, are thrown upon him. Upon strictly technical reasons alone is such a state of things allowed; and the property of the plaintiff, which would have been bound to make good the de-

CHAP. XXI.

Taxation of solicitor's bill.

If a client wishes to have his solicitor's bill taxed, and to compel him to give up deeds, papers, memoranda, etc., which he, as solicitor, holds in his custody, he may obtain an order for that purpose by petition or motion, giving in the meantime an undertaking to pay what shall appear due from him upon taxation. But when they come into the solicitor's hands in any other manner than in the way of business, that party must have recourse to his action (*o*). But should the client, having obtained the

fendant's losses after taxation, is now exempt, by reason of the plaintiff's death before that event. This principle, which considers costs as a personal demand, and ought not therefore to survive against the representative, is a mere figment, and seems to have overlooked the case of an innocent party, *i. e.* the defendant, who is thus punished, and his property diminished, by having to pay the expenses incurred through the really guilty person. The costs, whether taxed or not, are, in reality, nothing more than a debt due from the party by whom they are incurred. If, in addition to costs, a corporal punishment were awarded against him, there would be some justice in allowing the demand, so far as the latter part of the sentence extended, to die with the person; for no one would expect a man's personal representatives to suffer corporal punishment in the place and stead of the deceased offender. But, where costs have been incurred solely through one party, and the question arises whose estate shall pay those costs, it seems as unreasonable to make any distinction with respect to the liability before and after those costs are taxed, as to hold that two tradesmen, having had mutual dealings with each other, and one of them dying before the accounts are settled, the survivor of them shall not be entitled to the balance afterwards found due to him, because the accounts were not settled, and the balance not ascertained, during the lifetime of the other. It was, perhaps, upon the principle just mentioned, of regarding costs as a personal punishment, that, anciently, a pauper plaintiff who did not succeed in his suit, and who therefore could not satisfy the demands of justice out of his own pocket, was punished by whipping, or otherwise corporally.—Spence, 690, n. (*g*).

(*o*) Lawson *v.* Dickinson, 8 Mod. 306; Strong *v.* How, 8 Mod. 339. See *In re* Murray, 1 Russ. 519; also, *In re* Rice, 2 Keen, 181.

above order, afterwards die, his representative, for the purpose of receiving the same, must give the like undertaking to pay.

Where no account, payment, conveyance or other relief is sought against a party, but the plaintiff requires such party to appear to or answer the bill, the costs occasioned by the plaintiff having required such party so to do, and the costs of proceedings consequent thereon, shall be paid by the plaintiff, unless the court shall otherwise direct (40 Cons. Ord. r. 16, and see the same order *passim* as to costs).

Conclusion.

We have thus taken a general survey of the proceedings in a court of chancery from the commencement to the termination of a suit, during the progress of which the student cannot but have observed, by reason of the narrow limits afforded for the consideration of the subject, that most of the chapters have been treated with a necessary brevity. But although many of the topics, if exclusively discussed, would in themselves furnish materials for several volumes, yet, it is presumed that, by an attentive perusal of the foregoing pages the student will be enabled so far to master the leading features of a suit in equity, as not to feel bewildered while engaged in the innumerable points of detail that are more or less incidental to every stage of the proceedings, but which are beyond the design and compass of these pages to anticipate, since many of them are only to be acquired by actual practice and long experience.

There will, however, be seen as well in this as in every other treatise on equity jurisprudence and practice, sufficient to correct the erroneous idea too often entertained by the uninitiated, in regard to the lax and uncertain principles that regulate the decisions of our judges in the

CHAP. XXI.

Court of Chancery, as being left to the *forum conscientiæ* of the person who happens at the time to be the presiding genius of the court. This notion was begotten by the use of the word "equity," to describe the jurisdiction; which word even men learned only in systems of philosophy, or in other systems of law than that of our Courts of Chancery, have deemed must mean natural equity, as it might appear to the judge for the time being and unfettered by precedent. Only a patient study of the subject can exhibit to the inquirer how carefully the *principles* of natural equity have been argued out and laid down as applicable to particular circumstances or classes of cases, and subject to the conditions; that the court can only supplement the common and statute law, &c., not re-cast it; and must, moreover, of necessity not try to enforce many claims of natural equity, because of its inability to investigate, adjust and enforce all the mutual moral considerations and obligations between the parties. Indeed, it is not so much by the adoption of principles opposed to those of the common law, as by reason of its better machinery and fuller power of carrying out the principles common to both courts, that the Chancery Court has been able to administer equity. The reader, as he carefully traces the history of the rise and progress of our courts of chancery, from the time of the "Father of Equity," Lord Nottingham, down to the present moment, and marks the analogy so frequently upheld between the equity and common law courts, will observe the jealousy with which our great lawyers have adhered, as much as possible, to the broad and well-trodden paths of the old common law; he will discover, moreover, that, in the administration of the equitable jurisdiction, the chancellor himself, so far from being left to decide according to what he may deem reasonable in reference to the circumstances of each particular case, is

in the main tied down to certain fixed principles contained in the decisions of his predecessors, and as seen in the voluminous reports which have been transmitted to us, in an unbroken series, from the days of Vernon to our own. The proceedings of the chancery courts, says Lord Hardwicke (*p*), have been formed according to the course of the civil law in some respects, and analogous to the common law in others. In Bishop Burnet's Life of Sir Matthew Hale, we are told that this eminent judge "did look upon equity as a part of the common law, and one of the grounds of it; and, therefore, as near as he could, he did always reduce it to certain rules and principles, that men might study it as a science, and not think the administration of it had anything arbitrary in it." So that the Court of Chancery, whose principles and proceedings appear at first sight to oppose our favourite notions of the common law, has nevertheless, through the sound intelligence and unwearied exertions of those judges who have successfully occupied the woolsack, and rendered their names illustrious for talent and integrity, been the means of fixing our judicial system on such a basis as to meet the exigencies which are perpetually arising in a nation like our own, boasting of its civil rights, its unrivalled commerce, and its constitutional freedom.

(*p*) Davis *v.* Davis, 2 Atk. 23.

INDEX.

Abatement of suits, in what cases, 347.
where not, 347.

Absconding of defendant, 363.

Accident and mistake,
jurisdiction, where, 87.
in case of lost deed, 88.
when relieved against, 88.

Account,
concurrent jurisdiction over, 106.
delays of common law courts in matters of, 106.
objections to their taking same, 107.
bill for, by whom filed, 107.
lies as between trustee and *cestui que* trust, 107.
tradesmen and customer, when, 108.
factor and principal, 109.
partners, 110.
lies as against agents, auditors, land stewards and managers, executors, etc., 116.
merchants, 116.
lies only where a right at law, 108, 110.
lies not where set-off at law, 108, 109.
demands stale, 116.
account stated, unless fraud, 117.
account settled by arbitrators, 117.
what heir must allege in, 109.

Accumulation clause, as to infants, when controverted, 203.

Advertisements for creditors, 470, 478.

Ambler's Reports, 50.

Amendment of bill, before answer,
when allowed, 443—445.
after answer, admits its sufficiency, 448.
effect of, 448.
practice after, 448.
after replication, 447.
after exceptions, a waiver thereof, 448.
counsel's signature to, 445.
in times of vacation, 447.

Answer,
to compel answer from member of parliament, 383.
married women, 383.
infants and lunatics, 383.
most usual mode of defence, 419.
form of, 419.
must be signed by counsel, 426.
a traverse, when so considered, 421.
when plea stands for, 416.
in addition to plea, 415.
amendment of, 384.
to amended bill, 378.
alterations made by 15 & 16 Vict. c. 86, s. 10..419.
interrogatories filed separate, 375.
interrogatories as to particular defendant, 420.
reasons for separation from bill, 420.
traversing note, 420.
when defendant may decline answering, 421.
necessity for traversing, 421.
division of answer into paragraphs, 433.
to cross bills, 349.
within what time, 375, 431.
process for compelling, 377.
further time for, 377.
exceptions to, 422.
for scandal, 422, 437.
when set down for hearing, 441.
by a stranger, 441.
no exceptions for impertinence, 437, 438.
for insufficiency, 422, 438.
within what time, 422, 438.
when set down for hearing, 439.
by registrar, 439.
why time given for reference, 439.
further answer after exceptions to, 439.
when considered as sufficient, 439.
how taken by commission, 428.
when taken without oath, 430.
of peers, quakers, corporations and foreigners, 430.
of a foreign prince, 482.
of infants, 430.
practice as to reading at hearing, 424.
of one defendant cannot be read against another, 424.
must be signed by counsel, 426.
when no evidence, 425.
when preferred to oath of witness, 429.
Ante-nuptial settlement, 180.
Appeal,
for relief, among Anglo-Saxons to king only, 6.
afterwards entrusted to chancellor, 6.
to equitable tribunal of great antiquity, 19.

Appeal—*continued.*
to Lords, 510.
notice of, 510.
exhibited by way of petition, 510.
petition, when to be presented, 512.
must be presented *after* enrolment, 512, 513.
Appearance,
of defendant, within what time, 362.
how compelled, 336.
how entered for defendant, 362.
infant or lunatic, 363.
by husband, for wife in what case, 372.
Appointees, parties to suit, when, 311.
Apportionment, 267.
Arbitration, specific performance of agreement for, 232.
Archer *v.* Hudson, case of, 127.
Arden, Sir Rich. P., M.R., 53.
Articles before marriage, 99, 100.
Assets,
when and how marshalled, 265, 266.
legal and equitable, 267, 268, 270.
Assignees of copyright, parties to suit, when, 312.
Assignor and assignee of debt, parties to suit, when, 312.
Atkyn's Reports, 50.
Attachment,
for what issued, 367.
for want of answer, 379.
for disobedience of orders, etc., 367.
to whom directed, 366.
when sealed, 366.
when irregular, 366.
when returnable, 366.
Attorney-General *v.* Harley, case of, 248.
Attorney's business, contract for sale of, 232, 233, 234.
Auctioneer when not allowed to purchase, 121.
Aula regia, destruction of, 23.
effects of, 23 *et seq.*

Bank annuities, injunction against transfer of, 169.
Bankruptcy, 78—82.
Act of, 1869..181.
chief judge in, 81.
Bathurst, Lord, 51.
Bill,
first step in suit, 290.
printed, served on defendant instead of former writ of subpœna, 360.

Bill—*continued.*
into what parts divided, 297.
must be signed by counsel, before filing same, 297, 298.
amendment of, before and after answer, 445, 446.
when, 444.
on what affidavits, 446.
by whom made, 446.
exceptions to, for scandal, 442.
when taken *pro confesso*, 381.
practice, 381 *et seq.*
when answer insufficient, 384.
when dismissed for want of prosecution, 449.
and answer, setting down cause upon, 450.
not where infant plaintiff, 454.
retained for purpose of trial at law, 519.
practice, when, 520.

Bills,
of grace, 40.
in council, 34, 40.
in parliament, 40.
in chancery, of three sorts, 343.
of exchange, parties to suits as to, 313—315.
1. Original, 343.
praying relief, 343.
decree respecting contested right, 343.
of interpleader, 167, 168, 343, 344.
practice as to, 168.
of *certiorari*, 344.
for partition, 345.
of foreclosure, 345.
necessary parties in suit for, 317.
of peace, 167.
of *quia timet*, 169.
not praying relief, 343.
for discovery, 343—347.
to perpetuate testimony, 347.
2. Not original, 343.
supplemental statements, 346.
revivor orders, 346.
original bill in nature of bill of revivor, 346.
in nature of supplemental bill, 346.
3. In the nature of original bills,
a cross bill, 349.
priority of answer, where, 351.
bill of review, 354, 514, 515.
ground for filing, 352.
error in law, 352.
fact, 352.
practice, 352, 353.
supplemental bill in nature of, 352, 353, 514.
limitation of time for, 353.
what must be shown, 353.

Bills—*continued.*
bill to impeach decree, 354.
to suspend decree, 354.
carry out, 354.
Bonds, 89.
stat. 5 Ann. c. 16, s. 12, as to, 94.
relief, where lost, 95.
assignment of, 162.
Brown's Reports, 52.
Bunn *v.* Guy and Bozon *v.* Farlow, cases of, 232, 234.

Camden, Lord, 51.
Cary's Reports, 46.
Cases *tempore* Talbot, 49.
Causes, *consent* and *short*, what, 499.
Caveat against enrolment of decree, 510, 514.
Certiorari, bills of, 344.
Cestuis que trust, when necessary parties to suit, 327.
Chambers, proceedings at, 464.
Chancellor, Lord,
functions of, 22.
why, presides in House of Lords, 22.
power of, increased by destruction of *aula regia*, 23.
Chancery cases, 46.
Chancery, Court of,
why, distinct, 4.
origin of, 12, 13, 14.
proceedings and practice of, should be adapted to existing state of things, 2.
precedents not required in, 42.
history of, how divided, 42.
progress of, 15.
became distinct, when, 16.
under Henry VI., 30.
increased in power under Edward IV., 17.
regulated then by civil law, 18.
extraordinary jurisdiction of, when begun, 18.
early practice of, 26.
opposed by courts of common law, from Henry VI. to James I., 30, 31.
jurisdiction in ordinary, 73.
extraordinary, 73, 85.
at common law, 75.
statutory, 77.
specially delegated, 74, 84.
equitable, 74, 85.
divided by Sir Matthew Hale into equitable or English, and legal or Latin, 74, n.

Chancery, Court of—*continued.*
jurisdiction—*continued.*
at common law, under three heads, viz.:—
1. Nomination of officers of court, 75.
2. Proceedings in petty bag office, 75.
3. Ordering of writs to be made out by cursitors, 75, 76.
equitable jurisdiction of, under seven heads, viz.:—
1. Accident and mistake, 87.
2. Account, 106.
3. Fraud, 118.
4. Infants, 192.
5. Married women, 209.
6. Specific performance, 220.
7. Trusts, 254.
jurisdiction in cases of wills, 173, 271.
concurrent jurisdiction in what, 65 *et seq.*

Charitable Trust Acts, 82.

Charity suits, Attorney-General necessary party to, 311.

Chose in action, assignee of, takes, subject to equities affecting same in hands of assignor, 163.

Civil law,
revival in the study of, when, 7.
by ecclesiastics, 7.
reasons for, 7, 8.
Vacarius, professor of, 8.
foundation of common law, 9, 10, and n.
among the Anglo-Saxons, 11, 12.

Clergy,
the only lawyers formerly, 11.
filled offices of chancery formerly, 12, 13.

Clerical errors in bills, how amended, 446.

Commission,
to take answer, 427.
practice, how altered, by 15 & 16 Vict. c. 86, ss. 21 and 22, 427.
to examine witnesses within the jurisdiction, abolished, 427.
when granted, 428.
when residing abroad, 427.
by whom prepared, 428.
commissioners, 428.
nomination of, 428.
direction of, 428.
when returnable, 428.
of review, 77.

Commission of Review abolished by 2 & 3 Will. 4..77.

Common-law courts,
inadequacy of, 1, 2, 34.
origin of, 61, 62.
oppose Court of Chancery, and why, 29, 30.
jurisdiction of Court of Chancery; *see* Court of Chancery.

Common Law Procedure Act (17 & 18 Vict. c. 125), 132.
Conquest, effects of the, 19, 20.
Conscience, when a rule of judicial conduct, 260.
Consent causes, 499.
Contempts,
how divided, 367.
process for, 366.
for insufficiency of answer, practice as to, 383.
must be cleared before any proceeding can be taken, 384.
when party *can* make a motion, 378.
waived by amending bill, when, 384.
filing replication, 385.
Contribution, 114.
by co-obligors and co-sureties, 114, 115.
by co-defendants, except in tort, 114, 115.
civil law as to, 115.
Conversion, 241 *et seq.*
effect of, 241.
where moneys entailed, 243.
Conveyance, mistake in, mode of relief in, 97.
where no relief given, 98.
Copyhold Enfranchisement Acts, 84.
Copyholds, when lord necessary party to suit, 317.
Copyright,
what, 151.
none in works *contra bonos mores*, 156.
in private letters, 157.
in musical compositions, 157.
in printed books, 158.
in designs in manufactures, 159.
international, 159.
injunction against infringement of, 151, 152.
plaintiff must establish his title at law before injunction granted, 152, 156.
usual cases of violation, 156.
not infringed by imitation, 156.
by abridgment, 157.
by fair quotations, 157.
Corporate body,
mode of suing, 291—294.
proceedings to compel appearance of, 374.
answers of, how put in, 430.
Costs, 592.
pauper, 588.
dives, 590.
jurisdiction of court as to, 588—592.
principles on which awarded, 593.
as between party and party, 596.

Costs—*continued.*
as between solicitor and client, 596.
generally paid by the unsuccessful party, 598.
of legatee, 598.
of suit for account, 599.
of issue, 600.
of heir-at-law, 600.
of infant, 601.
of feme coverte, 601.
of trustee, 602.
of relator in charitable informations, 603.
how ascertained, 604.
how recoverable, 604.
death of party not liable before taxation, 604.

Council, the Great, 11, 21.

Council, the Privy, 11, 21.
chief members of, 21, 22.
constitution of, 24.
twofold, 24.
1. deliberative.
2. decisive.
(1) legislative.
(2) judicial.
jurisdiction of, when concurrent with courts of equity, 25.
civil, 24, 25.
criminal, 24, 25.
to what it extended, 27.
early practice of, 28.
abandoned criminal jurisdiction to Star Chamber, 32.

Court of Requests,
origin of, 40.
resorted to by inferior description of suitors, 40.
business of, 41.
authority of, how destroyed, 41.
torture authorized by, 41.
abolished, when, 41.

Covenants running with the land, specific performance of, 230.

Coventry, Lord K., 46.

Cox's Cases in Chancery, 52.

Creditors' suits as to assets, and the administration thereof, 323.

Criminal charge, demurrer to answer to, 400.

Cross bills, practice as to, 488.

Crown, a party, Petition of Right, 294.

Curia regis, 21, 22.
represented now by parliament, 36, n.

Debenture Act, Mortgage, 1865..84.

Debts, priority of, 269.

Decree, motion for, 406.

Decree or decretal order under 15 & 16 Vict. c. 86, s. 15..452, 453.
motion for, 496.

Decree,
what, 508.
interlocutory, 508.
final, 508.
minutes of, 508.
passing, 509.
entering, 509.
enrolling, 509.
effect of, 509.
caveat against enrolling, 510, 514.
absolute, 502.
nisi, 502.
against first person having an estate of inheritance, effect of, 328.
process to enforce, 563 *et seq.*
notice of, on infant, 373.

Deeds,
thirty years old said to prove themselves, 478.
proof of, when fraud alleged, 482.

Defence,
various modes of, to bill, 390.
may be joined, 391.
by demurrer, 390.
when, 390.
what, 390.
confesses what, 391.
object of, 391.
to relief, 392.
grounds of, 392 *et seq.*
that the subject is not within jurisdiction, 392.
within jurisdiction of some other court, 392.
that plaintiff is under disability, 393.
has no interest, 393.
for want of privity, 393.
for want of parties, 396.
that defendant has no interest, 394.
that plaintiff does not show title, 393.
that the bill is insufficient for complete justice, 395.
for multifariousness, 396.
for misjoinder, 397.

Defence—*continued.*
by demurrer—*continued.*
to discovery, 398.
grounds of, 399.
case not proper, 399.
plaintiff no interest, 399.
defendant no interest, 399.
no privity, 399.
that the discovery would be immaterial, 399.
that defendant is so situated as to render it improper to compel same, 399.
by plea, 390.
how, 390, 404.
what, 390, 404.
by answer, 418.
by disclaimer, 434.
when separate costs, 426; and *see* Answer, Demurrer, and Plea.

Defence, acts as to compensation money, 84.

Defendant,
absconding, 363.
disclaiming, may be examined by co-defendant, 435.

Delegates, Court of, 77.

Demurrer,
must be drawn and signed by counsel, 401.
within what time, 360.
not after order for further time, 401.
not after attachment for want of answer, 401.
to relief only good, but not so to discovery only, 400.
practice as to argument, 400.
under new orders, 402.
allowed, usually ends the suit, 401.
overruled, application for time must be special, 401.
costs of, 401.
speaking, 400; and *see* Defence.

Depositions,
when suppressed, 476.
error in, 476.
to be taken in first person, 476.

Devastavit against executor or administrator, 298.

Devisavit vel non, issue of, 481.

Dickens' Reports, 50.

Disclaimer,
how put in, 434.
form of, 435.
and answer, effect of inconsistency between, 435; and *see* Defence.

Discovery,
bills for, 171.
practice as to, 88.
pleas as to, 413.
of facts charged in bill, 418; and *see* Defence.
Dismissal of bill, 502.
Distringas against corporation, 374.
on stock, 189.
Documents obtained by defendant's answer, practice at law as to reading, 424.
production of, on application of defendant, 432, 572.
Dower out of trust estates, 272, 273.
Durour *v.* Motteux, case of, 250.

Eden's Reports, 51.
Edictum perpetuum Hadriani, 5.
Eldon, Lord, 53.
Election,
between remedy at law and in equity, 169.
practice, 169, 170.
between natures of benefit, 248.
between property under different titles, 96, 97.
when compelled, 97.
Elegit, writ of, 566.
Ellesmere's (Lord) observations on office of lord chancellor, 44.
English bill, 293.
Enrolment of decrees,
effect of, 509.
caveat against, 510, 514.
Entailed lands to be purchased, when, 243.
Entailed moneys, 243.
Epochs, historical, of Court of Chancery, 42.
ecclesiastical, 42.
intermediate or lay, 42.
modern, 42.
Equitable bill, 109.
Equitable ejectment, 109.
Equitable jurisdiction of Court of Chancery, 74, 85.
Equity,
prerogative of, transferred by Edward III. to chancellor, 14.
principles of, whence derived, 42.
reports of, 42, 43, 44 *et seq.*
cases abridged, 48.
follows law, 270.
definitions of, 59, 60, 61, 62.
as administered in the Court of Chancery, 59, 61.

Equity—*continued.*
court of, general description of, 60.
ancillary to, concurrent with and exclusive of a court of law, 61.
will enforce judgment at law, 63.
will not oppose plain rules of law, 64, 270, 271.
general objects of, 70.
1. Where no sufficient remedy at law, 70.
2. Cases of fraud, 71.
3. Trusts, 72.
4. Assisting courts of law, and how, 72.
5. Waste, 72.
6. Restraining setting up doubtful claims, 72.
7. Interpleader, 73.
8. Preventing vexatious litigation, 73.
9. Compelling discovery, 73.
10. Perpetuation of testimony, 73.
specific performance of contracts, 71.

Erskine, Lord, 53.

Estates in settlement, necessary parties to suit as to, 325, 326.

Estrepement, writ of, 144, 145.
when abolished, 145.

Evidence,
practice, 455.
Four methods:
1. By evidence contained in the pleadings, 455.
2. By evidence produced from oral examination, 457.
3. By documentary evidence, 476.
4. By evidence from affidavits, 483.
uncertain method of former practice, 458.
closing of, 492.
when, 492.
how, 493.
where examination *de bene esse*, 485.

Examinations,
practice and mode of, 483.
in court, 493.
de bene esse, 485.
in meliori formâ, 485.
in perpetuam rei memoriam, 485.

Exceptions to answer, 437.
within what time, 437, 438; and *see* Answer, exceptions to.

Exchange, bill of, destroyed, court no jurisdiction, 95.

Execution creditor, when made trustee, 284.

Executors when trustees, 264.
and trustees, difference as to liability of, 284, 285.
right of, to undisposed residue, 264.
accounts of, 275.

Executors when trustees—*continued.*
when liable to pay interest, 275, 276.
as to being made parties to suits, 20 & 21 Vict. c. 77..310.
Exhibits, 476.
how proved, 476.
Expectancies, sales of, 128, 131.

Fellowes *v.* Mitchell, case of, 285.
Feme coverte,
specific performance of contracts by, 236.
mode of suing, 291.
mode of defending, 292.
Feoffment, where incomplete relief, 96.
Fidei commissum, 255.
Fieri facias, writ of, 566.
Finch, Sir Heneage, 46, n.
Fines, as to, where titles legal and where equitable, 409.
Foreclosure, bill for, 91, 92.
necessary parties to, 317.
proceedings to take *pro confesso,* 366.
decree in, when binding on an infant, 505.
Foreigners, answer of, how put in, 430.
Fraud, 118.
taken cognizance of in equity, 118.
jurisdiction of courts of equity to prevent, in what cases, fiduciary relations, 118.
to redress, 118, 171.
actual and constructive, 172, 178.
to what extent relieved against, 172, 173, 174.
in obtaining a will, not cognizable in courts of equity, 173, 174.
rules as to, 174.
as to price, 176.
what will be set aside for, 177, 178.
in alienations by executors, relieved against, 185.
constructive, 178.
Friendly societies, all members must be joined in suit against trustees, 321.
Further directions, 489.

Gifts from aged persons, 183.
Green *v.* Jackson, case of, 250.
Guardian,
and ward, 127.
cases as to, 127.
appointed by *father* only, 192.
substituted by court, when, 194.

Guardian—*continued.*
misconduct of, 195.
disputes with ward, 202.
ad litem, 292, 374.
Guardianship of infant wards, 192.
natural children, 199.
testamentary office not assignable, 200.
right of, by parent, may be the subject of contract for valuable consideration, 201.

Habeas corpus cum causâ, writ of, 26, 380.
when issued, 27, 380.
instances of issue of, 27, n.
Hardwicke, Lord, 50.
Hearing of cause, 501.
practice at, 502.
Hearing of cross bill, 352.
Heir-at-law,
when he need not be made a party, 316, 317.
when trustee of mortgage money for executors, 315
Hindson *v.* Kersey, case of, 479.

Idiots, 84.
mode of suing, 294.
defending suit, 294.
appeal concerning, 85.
Ignorance of legal rights,
when effects of, relieved against, 104.
a defence only, 105.
Impertinence in answer, 437.
reference for, abolished, 438.
Inadequacy of price, 176, 177.
Incumbrancers, when necessary parties to suit, 319.
Infants, 192.
guardianship of, 192, 193.
necessity of making infant a ward of court, 194.
will be removed from influence of immoral parents, 195.
power of mother over, 197.
are not bound by improper settlements, 202.
specific performance of contracts by, 237.
trustees and mortgagees, act as to, 23 & 24 Vict. c. 145, s. 26.
plaintiffs, 289.
defendants, 294.
in foreclosure suit, 505, 506.
proceedings to compel answer of, 372.
answer of, 373.
how far bound by decree, 503.
aggrieved by decree, 506; and *see* Wards.

Information, 291.
and bill, 291.

Injunction, 131.
when applied for, 131—134.
generally necessary to file bill for, 132.
bills for—practice, 134, 135.
common, when granted formerly, 133.
effect of, 135.
why granted, 135.
provisional—perpetual, 138.
special, 139.
when granted, 140.
practice, 140.
how dissolved, 144.
when obtained in vacation, 142.
perpetual, when granted, 167.
service of writ of, 143.
to stay waste, 144.
to prevent infringement of patent, 149.
not granted *ex debito justitiæ*, 150.
copyright, and why, 151.
indorsement of negotiable securities, 161.
assignment of wife's property, 163.
transfer of stock and bank annuities, 163.
frequently refused, where misconduct, 156.
case of refusal, copyright, 156; and *see* Copyright, Waste, Patent.

Injunction after judgment at law much opposed at first, 30.

Insolvency, 79, 80, 81.
of husband, where marriage settlement, 231.
of deceased person, necessary parties to suit, 324.

Interest on purchase-money at law and in equity, 236.

Interests in lands of three sorts, 259.

Interpleader, bills of, 167.

Interrogatories,
within what time served after defendant's appearance, 376.
need not all be answered, 421.
must not be leading, 476.

Intoxication of one of parties to contract, specific performance, 237.

Issue,
as to law, 517.
facts, 476, 517.
of *devisavit vel non*, 481.
practice after, 517.
costs of, 511.

Joint and separate debt at law, 316.

Joint and several demand, parties to suit, where, 316—7th Cons. Ord. r. 2, as to.
Joint-stock companies,
bankruptcy of, 82.
necessary parties to suit as to, 324.
Joint tenants co-plaintiffs, death of one, no abatement, 347.
Jones *v.* Scott, case of, 276.
Judge's chambers,
course of proceedings in, 522.
duties of chief clerk, 523.
certificate of, 524.
no exception taken thereto, 524.
signing and adopting of, by the judge, 525.
filing, effect of, 525.
how discharged, 525.
judge's authority in chambers, 525, 526.
conveyancing counsel, 527.
application to be made at chambers, 527, 528, 529.
summons to,
general, 530.
special, 530.
practice of, 530 *et seq.*
orders and directions, whether originating at chambers or not, 533 *et seq.*
course of proceedings in chambers like that usually adopted with regard to motions in court, 540.
form of summons in chambers, 547 *et seq.*
Judgment,
against tenant in tail, 244.
by virtue of the 27 & 28 Vict. c. 112, s. 3, will affect lands entailed, 244.
Judgment creditors, 318.
stat. 2 & 3 Vict. c. 11, relating to *lis pendens*, 318, n.
Jurisdiction of equity courts,
concurrent, 65.
exclusive, 69.
auxiliary, 69.
Jurisprudence, rise and progress of, 1 *et seq.*
Just allowances to trustees, 602.
Justinian's code, 5.

Kent, Professor, on English law reports, 47, 57.
Kenyon, Lord, 47, n., 52.
King, Lord, 47, 49.
King, The, the fountain of justice, 22.

Laches, effect of, on specific performance, 235.

Leases, relief where execution defective, 97, 98.
Legacies,
charged on land, 263.
lapsing, fall into residue, 242, 264.
on real and personalty, 264.
Legatee, costs of, 598.
Letter missive, service of, on peers, 357.
Lis pendens, 355.
Livery of seisin, relief when omitted, 96.
Lord of manor, when necessary party to suit, 317.
Lords, House of, origin of, 11.
legal jurisdiction of, 22.
why lord chancellor at the head of, 22.
Loughborough, Lord, 52, 53.
Lunatics, 84, 85.
appeal concerning, 85.
specific performance of contracts by, 236.
trustees, 282.
mode of suing, 292.
defending suit, 294.
how appearance entered for, 363.
how answer by, compelled, 383, 430.
Lyons *v.* Blenkin, 200.

Maintenance of infant wards, 202.
allowed out of capital in certain cases, 204.
23 & 24 Vict. c. 145, s. 26..203.
out of *child's* estate, 202.
Maitland *v.* Irving, 127.
Marriage,
provisions in restraint of, 184, 185.
of infant wards, 204.
by consent of court, 205.
as to settlement, 205.
without consent, a contempt, 206.
male wards, court no power over, in what case, 207.
Marriage brokage bonds, 184.
Married woman,
separate property of, 372.
proceedings to compel appearance by, 372.
her rights at common law, 209.
separate use, a creature of equity, 210.
her general engagements will not bind her separate estate, 210.
general insufficiency of separate estate to protect her at all times, 211.
restraint on alienation clause, 212.
equity to a settlement, what, 215.

Married woman—*continued.*
binding against husband's assigns and assignees in bankruptcy, 216.
but not against a purchaser for value without notice, 217.
as to the amount to be settled, 217.
wife's right of waiver, when to be exercised, 217.
"Married Women's Property Act," 33 & 34 Vict. c. 93..218.

Marshalling assets, 265, 266.
not allowed as to legacies in favour of charities, 252, 266.

Masters in Chancery,
appointed by statute 13 Edward I., 6.
original duties of, 6, 7.
issued writs in ease of chancellor, 6.

Medical men and patients, gifts between, 125.

Member of parliament,
proceedings to compel appearance by, 371.
answer, 383.

Merger of equitable in legal estate, 273, 274.

Misjoinder, what, 397.

Mistake in written contract, relief where, 96.
in a will, 102.

Mixed fund for charitable purposes, 250.

Money devised to build church, when void, 249.

Money to be laid out in land, 245.

Mortgage Debenture Act, 1865..84.

Mortgage, equity of redemption of, 90.

Mortgagee's remedy, 170.

Mortmain Act, 245.
effect of, 245.
Lord Hardwicke on the, 246.
disability under the, 247.
extent of the, 247.
as to leaseholds, 250.
mixed fund how regarded under the law of mortmain, 251.
marshalling assets not allowed in charitable bequests, 251.
mixed fund how dealt with in charitable bequests, 251.
several Acts on the subject of mortmain, 252, 253.

Moseley's Reports, 49.

Motions and Petitions, 578.
for what purpose made, 578.
difference between a motion and petition, 578.
special motion—motion of course, 578.

Motions and Petitions—*continued.*
ex parte, 578.
when granted by the chief clerk, 579.
petition of course addressed to the master of the rolls, 579.
order on motion how discharged, 580.
same on petition, 580.
how many days for notice of motion, 580.
service out of the jurisdiction, when, 581.
how headed, 581.
special petition when served, 581.
costs to a party served with notice of motion or with petition, 582.
evidence on motions and petitions by affidavit, 583.
or orally before an examiner, 583.
motion, answer treated as an affidavit, 584.
heard in court according to seniority of counsel, 585.
petitions by whom set down, 585.
inquiries in chambers as to, 586.
petitions, adjournment of, 587.

Multifariousness, 396, 397.

Ne exeat regno, 303.
writ of, 303.
to what cases restricted, 303.
affidavit necessary for, 303, 304.
how discharged, 305.
to restrain from going to Scotland, 305.
"beyond seas," how understood, 305, 306.

Negotiable securities, 161.
injunction against indorsing, 161, 162.
indorsed after due, subject to what equities, 162.

Non-appearance of defendant, 363.

Nonjoinder of parties, practice on objections as to, 338.

Northington, Lord, 51.

Nottingham, Lord, 46.

Nudum pactum, 225.

Nuisances,
public, 164.
injunctions against, 164—166.
private, 166.
injunctions against, 166.
judgment at law necessary first, 166.

Obligee of bond, or judgment creditor, after assignment, necessary parties to suit, 312.

Obligee of joint and several bond need not join all co-obligors, 316, 329.

Officer of public company, 321.

Orders,
obedience to, how compelled, 563.
practice as to compelling, 564.
against persons not parties, 563.
corporations, 570.
married women, 571.

ORDERS, CONSOLIDATED:—
25 Cons. Ord., 134.
42 Cons. Ord., 170.
42 Cons. Ord. r. 5..170.
42 Cons. Ord. r. 6..170.
42 Cons. Ord. r. 7..171.
42 Cons. Ord. r. 8..171.
Restraining Order, 186.
Stop Order, 187.
27 Cons. Ord. r. 1..190.
Cons. Ord., Feb. 1, 1861..278.
41 Cons. Ord. r. 1 (1), 280.
35 Cons. Ord. r. 1, arts. 4, 5..283.
35 Cons. Ord. r. 1, art. 3..283.
9 Cons. Ord. r. 5..298, n.
24 Cons. Ord. r. 1..299.
Prelim. Cons. Ord. r. 10 (7), 299.
24 Cons. Ord. r. 1..301.
24 Cons. Ord. r. 2..301.
24 Cons. Ord. rr. 2, 3, 4..301.
7 Cons. Ord. r. 2..316.
7 Cons. Ord. r. 1..317.
23 Cons. Ord. r. 18..332.
32 Cons. Ord. r. 1..341.
19 Cons. Ord. r. 6..352, n.
28 Cons. Ord. r. 7..352, n.
10 Cons. Ord. r. 1..319, 362.
10 Cons. Ord. r. 4..363.
10 Cons. Ord. rr. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18..362—370.
7 Cons. Ord. rr. 3, 4, 5, 6, 7..373, 374.
37 Cons. Ord. r. 3, r. *4..375.
11 Cons. Ord. r. 1, rr. 2 & 3..376.
11 Cons. Ord. rr. 4 & 5..376.
37 Cons. Ord. rr. *5, *6..377.
22 Cons. Ord. r. 2..377.
37 Cons. Ord. r. *7, r. 8..378.
12 Cons. Ord. r. 1..380.
12 Cons. Ord. rr. 2 & 3..381.
12 Cons. Ord. rr. 4, 5, 6..382.
12 Cons. Ord. r. 7..383.
13 Cons. Ord. r. 6..383.

Orders, Consolidated—*continued.*
22 Cons. Ord. rr. 1, 2..385.
22 Cons. Ord. rr. 3, 4..386.
22 Cons. Ord. rr. 7, 8, 9, 11, 12, 13, 14..388, 389.
14 Cons. Ord. r. 11, r. 1..400.
14 Cons. Ord. rr. 12, 13, 14, 15..402.
14 Cons. Ord. rr. 8 & 9..403, 413, n.
14 Cons. Ord. r. 6..409.
15 Cons. Ord. r. 4, n., 414.
14 Cons. Ord. r. 2..416.
14 Cons. Ord. r. 16..417.
14 Cons. Ord. rr. 17, 18..418.
15 Cons. Ord. r. 4..421.
15 Cons. Ord. r. 1..422.
16 Cons. Ord. r. 6..422.
15 Cons. Ord. r. 3..423.
1 Cons. Ord. r. 39..426.
40 Cons. Ord. r. 12..426.
3 Cons. Ord. rr. 1, 2, 5..428, 430.
37 Cons. Ord. r. *5, r. 4..431.
15 Cons. Ord. r. 1..433.
42 Cons. Ord. r. 6..438.
16 Cons. Ord. r. 12..439.
16 Cons. Ord. r. 9..539.
16 Cons. Ord. r. 13..439.
16 Cons. Ord. r. 16, arts. 1, 2 & 3..439.
12 Cons. Ord. r. 10..440.
16 Cons. Ord. r. 18..440.
16 Cons. Ord. r. 17..440.
16 Cons. Ord. r. 14..440.
16 Cons. Ord. r. 15..440.
16 Cons. Ord. r. 20..441.
9 Cons. Ord. r. 17..444.
33 Cons. Ord. r. 11..444.
37 Cons. Ord. r. 7..444.
33 Cons. Ord. r. 12, arts. 1, 2, 3..445.
9 Cons. Ord. r. 16..446.
9 Cons. Ord. r. 68..447.
37 Cons. Ord. r. 13..447.
33 Cons. Ord. r. 10, arts. 1, 2, 3..447.
17 Cons. Ord. r. 1..452.
17 Cons. Ord. r. 2..452.
31 Cons. Ord. r. 9..455.
19 Cons. Ord. r. 1..464.
17 Cons. Ord. r. 1..465, 466.
19 Cons. Ord. r. 9..484.
19 Cons. Ord. r. 12..484.
19 Cons. Ord. r. 16..488.
33 Cons. Ord. r. 4—8..490.
Ord. 22 Nov. 1866, r. 2..496, 497.

Orders, Consolidated—*continued.*
21 Cons. Ord. r. 1..497.
33 Cons. Ord. r. 10..497.
33 Cons. Ord. r. 13..497.
21 Cons. Ord. rr. 2, 9..498.
6 Cons. Ord. rr. 2, 3..498.
21 Cons. Ord. r. 4..501.
21 Cons. Ord. r. 5..501.
21 Cons. Ord. r. 1..501.
28 Cons. Ord. r. 1..501.
23 Cons. Ord. r. 13..502.
21 Cons. Ord. r. 6..507.
1 Cons. Ord. rr. 20—26..509.
1 Cons. Ord. rr. 18, 19..509.
23 Cons. Ord. r. 1..511.
31 Cons. Ord. r. 1..511.
41 Cons. Ord. r. 26..520.
33 Cons. Ord. r. 14..533.
33 Cons. Ord. r. 15..533.
33 Cons. Ord. r. 16..533.
42 Cons. Ord. r. 9..534.
42 Cons. Ord. r. 10..534.
42 Cons. Ord. r. 11..534.
24 Cons. Ord. rr. 1, 16, Ord. 13..535.
24 Cons. Ord. r. 2..535.
42 Cons. Ord. r. 13..536.
24 Cons. Ord. rr. 3, 4..541.
35 Cons. Ord. rr. 3 to 62 inclusive, 547.
21 Cons. Ord. r. 9..554.
6 Cons. Ord. r. 5..554.
21 Cons. Ord. r. 10..555.
35 Cons. Ord. r. 52..555.
29 Cons. Ord. r. 1..563.
29 Cons. Ord. r. 2..563.
29 Cons. Ord. r. 3..564.
29 Cons. Ord. r. 4..564.
29 Cons. Ord. r. 6..567.
29 Cons. Ord. r. 7..567.
29 Cons. Ord. r. 8..567.
29 Cons. Ord. r. 9..567.
3 Cons. Ord. rr. 2, 5..568.
29 Cons. Ord. r. 10..568.
29 Cons. Ord. r. 11..568.
29 Cons. Ord. r. 12..569.
29 Cons. Ord. r. 13..569.
30 Cons. Ord. r. 1..569.
30 Cons. Ord. r. 2..570.
30 Cons. Ord. r. 3..570.
30 Cons. Ord. r. 4..570.
30 Cons. Ord. r. 5..570.

Orders, Consolidated—*continued.*
42 Cons. Ord. r. 4..577.
23 Cons. Ord. r. 17..579.
3 Cons. Ord. r. 8..580.
6 Cons. Ord. rr. 5, 6, and 33, r. 1..581.
34 Cons. Ord. r. 1..581.
34 Cons. Ord. r. 2..581.
7 Cons. Ord. r. 8..589.
7 Cons. Ord. r. 10..589.
40 Cons. Ord. r. 32..596.
40 Cons. Ord. r. 16..607.

Paris *v.* Paris, case of, 471.

Parliament, the origin of, 21.

Parol agreement, 225.

Part performance, 227, 228.

Parties, formal service of copy of bill on, 367.

Parties generally under, 10 Cons. Ord. r. 1, 362, 363.

Parties to a bill, 311.

Parties to bill out of jurisdiction, 326.

Parties to suits, 307 *et seq.*
must include all interested, 307.
except when, 308.
rules, 309.
principles of court, as to, 308, 309, 310.
executors, 310.
for administration of assets, 311.
as to bonds, 312, 315, 316.
breach of trust, 327.
for discovery, 328.
for foreclosure, 317.
by next-of-kin, 323.
relating to public companies, 321.
for ascertained share of personalty, 313.
as to partnerships, 323.
to carry out trusts of will, 315, 316, 325, 333, 335.

Partnership,
accounts, 110.
dissolution of, in bill for account, 111, 112.
lunacy, 111.
not necessarily constituted by the fact of receiving a percentage, 112.

Patent,
what, 150.
for what granted, 150.
will not be granted for a principle, 153.
injunctions against infringement of, 149—151.
action at law before injunction granted, where required, 150.
account pending action, 154.

Patent error, where relieved against, 102.

Pauper,
leave to sue as a, 588.
when given, 588.
affidavit of poverty, 589.
cannot sue as, except in their own right, 589.
next friend of infant and married woman, difference between, 590.
instituting vexatious suits, 591.
when dispaupered, 591.
costs of, 591.
counsel and solicitor, 588.

Peace, bill of, 167.

Peer,
proceedings to compel appearance of, 371.
answer of, 482.
testifies on oath, 482.

Peere Williams's Reports, 48.

Penalty,
what, 87, 88.
of bonds, 89.
origin of, 92, 93.
relief against, 90.
on breach of contract, rule as to, 222.

Perpetual injunction, 167.

Perpetuating testimony, bills for, 171.

Petition; *see* Motions.
of right, 294.
to council, 40.
(1.) bills of grace, 40.
(2.) of council, 40.
(3.) in parliament, 40.
of rehearing, 316.

Petty bag office, 75.

Piracy of books, printed music, and prints, 154.

Plaintiffs representing large bodies, 308.

Plans, etc., how proved, 476.

Plea,
what, 404.
of three kinds:—
(1.) to jurisdiction of the court, 405.
(2.) to person of plaintiff, 405, 406.
that the plaintiff is an outlaw, 406.
formerly excommunicated, 406.
a popish recusant convict, 406.
attainted, 406.
an alien, 406.
under what circumstances, 406.
not *sui juris*, 406.
not what he pretends to be, 406.
not interested, 407.
(3.) in bar:—
pleas of matters of record, 407.
in court of equity, 407.
not of equity, 407.
of fine and non-claim, 409.
of recovery, 409.
of judgment at law, 409.
of sentence of some other court, 410.
of matters *in pais*, 410.
of account stated, 410.
of award, 410.
of a release, 410.
of a will or other instrument, 411.
of Statute of Frauds, 411.
of Limitations, 412.
in bar, 413.
of equal equities, 413.
to discovery, 413, 417.
plaintiff no proper case, 413.
interest, 413.
defendant no interest, 413.
defendant's situation renders discovery improper, 414.
may subject him to pains and penalties, 414.
to forfeiture, 414.
would betray some confidence, 414.
that he is a purchaser without notice, 414.
where title to part only of discovery sought, 415.
rules as to, 415.
form of, 415.
when answer required in addition, 415.
when put in on oath, 416.
practice as to argumentation, 416.
when taken for answer, 416.
when untrue, 417.
practice, when overruled, 417.
to discovery, 417.

Plea—*continued.*
how amended, 417.
must not be double, 404, 405.
practice as to, 417.
costs of, 418.
dismissing bill during pendency of, 418; *see* Defence.

Post-nuptial settlements, 180.

Powers,
defects in execution of, relief, 97.
when executed, no relief, 98.
except where, 98.
non-execution of, where, unless a trust, 99.

Prætor, equitable jurisdiction of, 3.

Prayer,
for relief, 343.
for process *ne exeat regno*, 297, 303.
for receiver, 297.
against peers, 306.
attorney-general, 306.

Precedents,
in chancery (Reports), 48.
in equity, uses of, 44, 45.

Present practice of service by printed copy of bill, 360.
when printed bill may be dispensed with, 361.
1. In case of injunction.
2. Ne exeat regno.
3. Making an infant a ward of court.

Price, inadequacy of, 177, 178.

Prince, foreign, answer of, 482.

Priority of debts, 269.

Privity of interest in co-plaintiffs, 312, 313, 322.

Pro confesso, when bill taken, 366.
for want of answer, 380, 386 *et seq.*

Pro interesse suo, 565.

Probate of will, generally sufficient proof thereof, 481.

Procedure Act, Common Law, 17 & 18 Vict. c. 125..132.

Process, service of,
old form by subpœna, 356.
generally, 569.

Prochein ami, 292.
written authority to file bill, 361.

Production of documents, 572.

Profert and oyer on bills of exchange abolished, 95.

Prynne, 32, 33 and n., 38 and n., 39 and n.

Public company, suits against, 321.
Publication,
passing; *see* Closing Evidence.
Purchase-money of estate contracted to be bought, where assets insufficient, 271.
Purchase of estate,
by parties holding fiduciary situations towards vendor, 118 *et seq.*
by trustee, for sale on behalf of infant, practice as to, 120.
by solicitor to trustee, not allowed, 120.
by executors and trustees, having renounced or disclaimed, 121.
by auctioneers, 121.
by attorneys or solicitors, 123.
cases as to, 124, 125.
with or without notice of a charity, how affected, 181.
bonâ fide from voluntary grantee, 181.
Purchaser, with notice of trust, bound thereby, 271.
Purpresture, injunctions against, 165.

Quaker's answer, how put in, 430.
Quia timet, bills of, 168.

Railway companies, bankruptcy of, 82.
Receiver,
what, 299.
when appointed, 300, 301.
who may not be, 302.
powers and duties of, 301, 302.
Redeem, bills to, necessary parties to, 319, 320.
Redemption, equity of, 90, 91.
Re-hearing, 510.
and appeal, difference between, 516.
petition for, 515.
before enrolment, 510, 515.
Rent,
account of, 110.
recoverable, when in arrear, for six years only, 110.
except where, 110.
Replication, 452.
practice as to, 452.
Reports of cases,
how originated, 42, 43, 44.
proper mode of studying, 56, 57.
Requests, Courts of, 40; *see* Court of Requests.
why abolished, 41.
Rests, annual,
as between mortgagee and mortgagor, 121.
rules as to, 122, 123.

Retainer to solicitor, 289, 290.
Returns *coram nobis*, 31.
of three sorts, and what, 31.
Reversions, contracts for sale of, specific performance, laches, 235.
Review,
commission of, 77.
bills for, 352.
when brought, 514.
Roman prætors,
duties of, 3, 4.
powers of, 3, 4.
modified Laws of Twelve Tables, 4.
Rome, administration of equity at, 3, 4.

Sales Act, confirmation of, 84.
Sanity,
proof of, requisite to proof of will, 479.
not however so as to deed, 479.
Scandal in answer, 437.
Scott *v.* Tyler, Lord Thurlow's judgment in, 185.
Security for costs, where required, 307, 308.
Sequestration,
writ of, 371.
to compel appearance, 371.
to enforce a decree, 563.
Session, courts of, in Scotland, 3.
Set-off in matters of account, 109, 110.
Setting down cause for hearing, 496.
when by defendant, 496.
what previously necessary, 496.
Settlement,
strict, when decreed, 99, 100.
ante-nuptial, 180.
mistake in, seldom relieved against, 100, 101.
mutual error in, 101.
post-nuptial, 180.
voluntary, 179.
Shipping Act, Merchant, 1854..84.
Short causes, 499.
Somers, Lord, 48.
Sovereign prince, when party to suit, 482.
Speaking demurrer, 400.
Special case, 557 *et seq.*
Specially delegated jurisdiction of court, 84.
Specialty contracts, 225.

Specific performance of agreement, 220.
only where legal remedy defective, 220.
cases for equitable interference, 220.
not decreed where no legal competency to perform the agreement, 221.
Lord Redesdale's reasons upon, 221.
equitable title in vendor sufficient, 222.
part of a contract may be enforced, under what circumstances, 222.
penalty for non-performance no substitute for specific performance, 222, 223.
obligation on parties desirous of specific performance, 223.
court will decree performance in specie where only a slight misdescription, 224.
contracts not decreed where against public policy, 224.
e. g., sale by a government officer of his future pay connected with future services — *Maintenance — Champerty*, 225.
nudum pactum, what, 225.
contracts either *special* or *parol*, 225.
no intermediate order known as contracts in *writing* by the English law, 225.
Statute of Frauds, 29 Car. 2, c. 3, s. 4, effect of, 226.
where part performance sufficient to avoid the effect of the, 227.
what the court requires in such cases, 228.
part performance to what extent required by the court, 228.
difference in the effect of covenants running with the land and common covenants in a lease as to specific performance, 230.
persons under control of covenantor, how dealt with, 230.
maxim "he who seeks equity must do equity," how far it controls a bill for specific performance, 231.
of agreement for arbitration, 232.
of contract for sale of an attorney's business, 232.
Bunn *v.* Guy, 232.
Bozon *v.* Farlow, 234.
where gross laches, 235.
parties must be able and willing to contract, 236.
by a lunatic, 236.
mutuality of remedy, 237.
when one party intoxicated, 237.
agreement must be certain, defined and equal, 237.
must be fair, adequate and reasonable, 238.
"equity looks upon things agreed to be done as actually performed," effect of, in regard to specific performance of contract, 238.
accident to property between agreement for and actual conveyance, effect of, 239.
chief clerk's certificate, effect of, 240.

Specific performance of agreement—*continued.*
where one part of an agreement may be enforced without the other, 241.
effect of the doctrine of conversion, 241.
7 Will. 4 & 1 Vict. c. 26, upon lapsed devise of real estates, 242.
3 & 4 Will. 4, c. 74, s. 70, as to entailed estates purchased with trust moneys, 243.
exception to the rule that "what is contracted to be done is to be considered as actually performed," 244.
difference in effect between an estate directed to be sold and proceeds divided among several persons, and money to be invested in the purchase of land to the use of several persons, 244, 245.

Spiritual advisers, gifts to, 126, 127.

Star Chamber, 31.
origin of, 31.
offences cognizable by, 32.
practice of, 32.
process of, 32.
punishments awarded by, 33.
beneficial influences of, at first, 33.
when at its zenith, 34.
a refuge for the inferior suitor, 35.
when abolished, 36.

STATUTES—
9 Hen. III. c. 4, waste, 146.
52 Hen. III. c. 23, Marlbridge, 146.
6 Edw. I. c. 5, Gloucester, 146.
Westminster II. c. 35..204.
17 Rich. II. c. 6, costs, 592.
11 Hen. VII. c. 12, indulgence to pauper suitors, 588.
25 Hen. VIII. c. 19, ecclesiastical appeals, 77.
27 Hen. VIII. c. 10, Statute of Uses, 258.
34 & 35 Hen. VIII. c. 4, bankruptcy, 78.
37 Hen. VIII. c. 9, bonds, 93.
4 & 5 Phil. & M. c. 8, custody of female children, 192, n.
13 Eliz. c. 5, alienations in fraud of creditors, 179.
13 Eliz. c. 7, bankruptcy, 78.
27 Eliz. c. 4, voluntary settlement, 179.
12 Car. II. c. 24, guardianship in chivalry, 192.
29 Car. II. c. 3, frauds, 226.
3 & 4 Will. & M. c. 14, fraudulent devises, 315.
9 & 10 Will. III. c. 15, and Common Law Procedure Act, 1854, as to awards made rules of the court of equity, 83.
11 & 12 Will. III. against papists, 247.
5 Anne, c. 16, bonds, 94, 95.
6 Anne, c. 18, as to production of cestui que vie, 83.
7 Anne, c. 19, infant trustees, etc., 208.
8 Anne, c. 19, copyright in books, 156—158.

Statutes—*continued.*
4 Geo. II. c. 26, proceedings at law in English, 293.
5 Geo. II. c. 25, equity process when debtor absconds, 363.
6 Geo. II. c. 16, bankruptcy, 78.
7 Geo. II. c. 20, mortgages, redemption of, 89.
8 Geo. II. c. 13, copyright in prints, 158.
9 Geo. II. c. 36, Mortmain Act, 246.
7 Geo. III. c. 57, copyright in prints, 158.
17 Geo. III. c. 57, copyright in prints, 158.
36 Geo. III. c. 52, as to payment into court of any legacy or residue of personalty, &c., 83.
38 Geo. III. c. 71, copyright in sculpture, 158.
39 & 40 Geo. III. c. 56, entailed moneys, 243, repealed by 7 Geo. IV. c. 45.
40 Geo. III. c. 36, transfer of stock, 186.
41 Geo. III. c. 107, copyright in books, 158.
42 Geo. III. c. 116, s. 67, facilitating sales of timber, 83.
52 Geo. III. c. 101, Charities, Sir S. Romilly's Act, 82.
54 Geo. III. c. 56, copyright in books and sculpture, 156.
56 Geo. III. c. 60, Unclaimed Stock Act, 83.
7 Geo. IV. c. 45, money subject to the Court of Chancery, 243.
7 Geo. IV. c. 46, s. 9, Joint Stock Banking Act, suing by public officer, 295.
9 Geo. IV. c. 85, Mortmain Act, 253, 254.
11 Geo. IV. & 1 Will. IV. c. 65, lunatics, suits by, 292, 293.
11 Geo. IV. & 1 Will. IV. c. 70, Chester.
1 Will. IV. c. 4, executor, undisposed-of residue, 264.
1 Will. IV. c. 36, bill taken *pro confesso*, 455.
1 & 2 Will. IV. c. 56, bankruptcy, 78.
2 & 3 Will. IV. c. 92, bankruptcy, 77.
3 & 4 Will. IV. c. 15, copyright in drama, 158.
3 & 4 Will. IV. c. 27, injunction, 145.
3 & 4 Will. IV. c. 41, privy council, 77.
3 & 4 Will. IV. c. 47, bankruptcy, 78.
3 & 4 Will. IV. c. 74, fines and recoveries, 243.
3 & 4 Will. IV. c. 94, time for pleading, 432.
3 & 4 Will. IV. c. 104, debtor by simple contract, 266.
3 & 4 Will. IV. c. 105, dower, 272.
4 & 5 Will. IV. c. 29, investments of trust funds on real securities in Ireland on behalf of infants, &c., 84.
4 & 5 Will. IV. c. 82, extending 2 & 3 Will. IV. c. 33, substituted service, 357, 359.
5 & 6 Will. IV. c. 65, copyright in lectures, 158.
5 & 6 Will. IV. c. 76, municipal corporations, 82.
6 & 7 Will. IV. c. 19, Durham, 393.
6 & 7 Will. IV. c. 110, reduction of public library copies of works, 158.
7 Will. IV. & 1 Vict. c. 26, wills, 252.
7 Will. IV. & 1 Vict. c. 73, Joint Stock Companies suing by their public officer, 295.
1 & 2 Vict. c. 110, judgment creditors, 244.

Statutes—*continued.*
1 & 2 Vict. c. 110, bankruptcy, 78.
1 & 2 Vict. c. 110, charging order, 189.
2 Vict. c. 11, bankruptcy, 78.
2 & 3 Vict. c. 11, registration of *lis pendens*, 336, 355.
2 & 3 Vict. c. 29, bankruptcy, 78.
2 & 3 Vict. c. 54, custody of infants, 197.
2 & 3 Vict. c. 60, payment of debts out of real estates, 208.
3 & 4 Vict. c. 77, Grammar School Act, 82.
3 & 4 Vict. c. 82, charging order, 189.
5 Vict. c. 5, s. 4, restraining stock, 163, n.
5 Vict. c. 5, restraining transfer of stock, 186.
5 Vict. c. 5, distringas on stock, 189.
5 & 6 Vict. c. 26, s. 12, moneys paid by ecclesiastical corporations on sales or enfranchisements, 84.
5 & 6 Vict. c. 45, copyright; extension of author's privilege therein, 154.
5 & 6 Vict. c. 100, copyright, 159.
5 & 6 Vict. c. 122, bankruptcy, 78.
5 & 6 Vict. c. 122, insolvency, 80.
6 & 7 Vict. c. 65, copyright, 159.
6 & 7 Vict. c. 85, defendant examined as a witness, 435.
7 Vict. c. 12, copyright, international, 159.
7 & 8 Vict. c. 76, transfer of property, feoffment, 96.
7 & 8 Vict. c. 111, winding-up joint stock companies, 82.
8 Vict. c. 16, Companies Clauses Consolidation Act, 358.
8 Vict. c. 16, service on corporations, 358.
8 Vict. c. 18, service on promoters, 358.
8 Vict. c. 20, service on railway companies, 358.
8 & 9 Vict. c. 18, Lands Clauses Consolidation Act, 83.
8 & 9 Vict. c. 62, Unclaimed Stock Act, 83.
8 & 9 Vict. c. 70, Church Building Amendment Act, 82.
8 & 9 Vict. c. 106, transfer of property, feoffment, 96.
8 & 9 Vict. c. 118, common inclosures, money payment into court of, 84.
9 & 10 Vict. c. 20, Parliamentary Deposit Act, 83.
9 & 10 Vict. c. 28, dissolution of railway companies, 82.
10 & 11 Vict. c. 96, Trustees Relief Act, 279.
11 & 12 Vict. c. 28, Irish Trustee Relief Act, 279.
12 & 13 Vict. c. 74, Trustees Relief Act, 279.
12 & 13 Vict. c. 106, Bankruptcy Law Consolidation Act, 79.
13 & 14 Vict. c. 35, Sir G. Turner's Act, special case, 337, n., 557.
13 & 14 Vict. c. 60, the Trustee Act, 82, 281, 282.
13 & 14 Vict. c. 104, copyright of designs, 159.
14 & 15 Vict. c. 99, competency of witnesses, 468.
15 & 16 Vict. c. 12, International Copyright Act, 159.
15 & 16 Vict. c. 55, Trustee Extension Act, as to joint tenancy with infant in stock, 82, 208, 282.
15 & 16 Vict. c. 80, relating to stop orders, 187.
15 & 16 Vict. c. 80, Masters in Chancery Abolition Act, 432, 443.

Statutes—*continued.*
15 & 16 Vict. c. 83, s. 42, letters patent, infringement of, 131.
15 & 16 Vict. c. 85, Burial Acts, 82.
15 & 16 Vict. c. 86, s. 10, Chancery Amendment Act, 297.
15 & 16 Vict. c. 86, s. 54, accounts, 117.
15 & 16 Vict. c. 86, s. 62, questions of law and damages, 517, 518.
15 & 16 Vict. c. 86, Chancery Amendment Act, 166, 288, and *passim.*
16 & 17 Vict. c. 83, evidence of husband and wife, 469.
16 & 17 Vict. c. 117, facilitating sales of timber, &c., 83.
16 & 17 Vict. c. 134, Burial Acts, 82.
17 Vict. c. 113, devisees and legatees to take mortgaged estates *cum onere*, 268.
17 & 18 Vict. c. 25, service on industrial and provident societies, 358.
17 & 18 Vict. c. 31, s. 3, Railway and Canal Traffic Act, 131.
17 & 18 Vict. c. 119, bankruptcy, 79.
17 & 18 Vict. c. 125, The Common Law Procedure Act, 472.
18 Vict. c. 43, marriage of and settlement by infants under the court, 208.
19 & 20 Vict. c. 120, power given to guardians of infants as to leases and sales of settled estates, 208.
20 & 21 Vict. c. 54, frauds by trustees, bankers, &c., 274, n.
20 & 21 Vict. c. 77, to amend the law relating to probates and letters of administration, 310.
20 & 21 Vict. c. 77, to amend the laws as to probate and letters of administration, 272.
20 & 21 Vict. c. 85, custody of infants on dissolution of marriage, 198.
21 & 22 Vict. c. 27, questions of law and damages, 517, 518.
21 & 22 Vict. c. 27, to award damages, 144, 518, 519.
21 & 22 Vict. c. 27, s. 7, admission of documents, 478.
21 & 22 Vict. c. 70, designs for articles of manufacture, 159.
21 & 22 Vict. c. 95, Probate and Duty Act.
22 & 23 Vict. c. 35, Trustee Relief Amendment Act, 84.
22 & 23 Vict. c. 35, s. 14, trustees empowered to sell where land by will is charged with debts, 337.
22 & 23 Vict. c. 35, ss. 29, 32, trustees' more extensive powers of investment, 275—278.
22 & 23 Vict. c. 65, Lord St. Leonards' Act to amend the law of property and to relieve trustees, 286.
23 & 24 Vict. c. 35, trustees' power to sell, &c., 337, n.
23 & 24 Vict. c. 38, s. 10, trustees' more extensive powers of investment, 275—278.
23 & 24 Vict. c. 106, deposit, purchase and compensation moneys in respect of lands under Lands Clauses Consolidation Acts, 83.
23 & 24 Vict. c. 126, writ of dower and *quare impedit*, 72, n.
23 & 24 Vict. c. 145, Trustees and Mortgagees Act, 203, 287.
23 & 24 Vict. c. 145, applications of income or accumulations of property held in trust for infants, 203.

Statutes—*continued.*
24 Vict. c. 9, s. 3, Mortmain Act, 253, 254.
24 & 25 Vict. c. 3, s. 8, Unclaimed Stock Act, 83.
24 & 25 Vict. c. 73, designs for articles of manufacture, 159.
24 & 25 Vict. c. 96, s. 80, fraudulent trustees guilty of felony, 287.
25 Vict. c. 17, s. 4, Mortmain Act, 253, 254.
25 & 26 Vict. c. 42, questions of law and damages, 166, 517, 518.
25 & 26 Vict. c. 53, Land Transfer Act, 84.
25 & 26 Vict. c. 68, paintings, drawings and photographs, 159.
25 & 26 Vict. c. 88, s. 11, Merchandize Marks Act, 1862..166.
25 & 26 Vict. c. 89 (1862), Companies Act, consolidating all prior joint-stock companies, 296.
25 & 26 Vict. c. 89, The Companies Act, 1862..325.
service of proceedings upon, 359, n.
25 & 26 Vict. c. 108, Sales Act, confirmation of, 84.
Settled Estates Acts, 1856, 1858 and 1864..83.
26 & 27 Vict. c. 106, Mortmain Act, 253.
27 & 28 Vict. c. 13, charitable uses, 82.
27 & 28 Vict. c. 112, judgment and *elegit*, 318.
29 & 30 Vict. c. 57, Mortmain Act, 253, 254.
30 & 31 Vict. c. 132, trustees' more extensive powers of investment, 275—278.
32 & 33 Vict. c. 46, abolishing distinction between specialty and simple contract debts in administration of deceased persons' estates, 266—269.
32 & 33 Vict. c. 71, jurisdiction to chief judge in bankruptcy, 81.
32 & 33 Vict. c. 83, bankruptcy repeal and insolvent courts, 81.
33 & 34 Vict. c. 93, Married Women's Property Act, 218.

Statute of Uses,
effect of, 258.
defect in, 259.

Statutory jurisdiction of court, 77.

Stock, injunction against transfer of, 163.

Subpœna, writ of,
obnoxious to Commons originally, 17.
process of great seal by, 17, n.
obnoxious to people in 15 Henry VI., 29.
former practice of, to compel appearance, 356.
to compel appearance and answer abolished by 15 & 16 Vict. c. 86, s. 2..360.
ad testificandum, 463, 475.
duces tecum, 463.
to hear judgment, 497.
may contain how many names, 500.
return and service of, 501.
substituted service, defendant out of jurisdiction, 342.
service on joint stock company, 359, n. (*f*).
within the jurisdiction, 363.

Suggestio falsi, 174.

Suit,
by and against whom instituted, 289.
on behalf of crown, how instituted, 290.
by ordinary plaintiffs, mode of, 290.
by joint stock companies, 295.
by an alien, 296.

Suppressio veri, 175.

Surcharge and falsify, power to, altered by 15 & 16 Vict. c. 86, s. 54, 108.

Surrenders of copyholds, relief when defective, 97.

Surreptio, 176.

Talbot, Lord, 49.

Taxation of solicitors' bills, 606.

Testimony, bills to perpetuate, 343.
in what cases allowed, 485, 486.

Thurlow, Lord, 52.

Title Act, 1862, Declaration of, 84.

Tothill's Reports, 45.

Trade marks, 142.

Trading companies, winding-up, 82.

Traversing note, 464.

Trustee,
accountable for breach of trust, 274, 275.
when charged with interest, and when with profits, 276, 277.
buyer and seller for persons not *sui juris*, 119.
may not profit by trust, 277.
costs, 279.
lunatic, 282.
unwilling to act, 273.
how removed, 287, 288.

Trusts,
description of, 254.
uses and trusts, 254.
jus fiduciarium, 255.
prætor fidei commissarius, 255.
fidei commissum, 255.
by whom introduced into England, 256.
classification of different interests in land, Lord Hardwicke, 259.
use and trust synonymously used, 260.
conscience legally considered, 260.
definition of trust, 261.
trusts *express* or *implied*, 261.

Trusts—*continued.*
trust in *land* must be in writing under Statute of Frauds, 261.
trusts *implied*, 262.
by *construction*, 262.
executor when regarded as a trustee, 263.
executors' right formerly to undisposed-of residue, 263.
executed, 102.
no relief against mistakes where, 103.
executory, 103.
mistake may be relieved against, where, 103.
incomplete, no relief, 104.
will not fail for want of trustee, 273; *see* Uses and Trusts.

Turner *v.* Newport, case of, 267.

Tutors and pupils, gifts of, 126, n.

Uncertificated bankrupt may sue alone, when, 313.

Underhand contracts, 184.

Use upon a use, 258.
how far similar to trust, 254.

Uses and trusts, how introduced into England, 256.

Uses, Statute of,
effect of, 257.
defect in, 258.

Usurious contract, when and how set aside, 130, 131.

Usury,
vicious systems of, 129.
Lord Bacon's proposal as to, 130.

Vacarius, professor of civil law, 8.

Vacation, times of, when not reckoned, 422, n.

Venditioni exponas, 566.

Vernon's Reports, 47.

Vesey, sen.'s Reports, 50.

Vesey, jun.'s Reports, 53.

Voconian law, 255.

Voluntary bond, 185.

Voluntary conveyance,
no relief when defective, 104.
except in favour of creditor's wife and children, 97.

Voluntary settlement, 178.
as against settlor, 179.
in favour of children, 179.

Voluntary settlement—*continued.*
as against creditors, 179, 180.
purchasers, 179.
post-nuptial, 180.
against voluntary settlement, 180.
fraudulent against husband, when, 182.

Wards in chancery, 192, 193.
when protected by court, 195, 196.
as to filing bill before appointment of guardian to, 194.
not to be removed abroad, 196.
jurisdiction of court over, 199.

Waste,
what is, 145.
voluntary, 145.
permissive, 145.
where only punishable at common law, 146.
effect of Statute of Marlbridge on, 146.
injunction against, 146.
divided into general heads, 148.
equitable, 148.
cases for equitable interference as to, 149.
account of, required in equity, 149; *see* Injunction.

Weakness of mind in respect of contracts, 184.

Will,
construed by Court of Chancery, 272.
cancelled by mistake, relief, 104.
fraudulently obtained, as to, 272.
proof of, 478 *et seq.*

Williams *v.* Douglas, case of, 423.

Witenagemote the origin of present House of Lords, 11, 12.

Witnesses,
examination of, 458.
practice as to, 458.
commission for, 427.
who may be, 468.
objections to competency of, 467.
for want of reason, 467.
for religious principles, 467.
formerly for crime, 467.
formerly for interest, 467.
rarely after evidence closed, 474.
objections to credibility of, 467.
order for leave to impeach credibility of, 472.
with whom filed, 470.
method of impeaching, 472.
examination, 473.

Witnesses—*continued.*
unwilling to attend, 475.
practice when, 475.
must sign examination, 482.
to will, 481.
protection of, from arrest, 484.

Writ of assistance, 565.

Writ of right, the last,—abolition of, 77, n.

Writs issued by cursitors, 75, 76.

Year Books, 44, 45.

York, Honourable Charles, 51, 52.

Recat. AD
3-84

LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, W.C.

CATALOGUE

OF

Law Works

PUBLISHED BY

MESSRS. BUTTERWORTH,

LAW BOOKSELLERS AND PUBLISHERS

TO THE QUEEN'S MOST EXCELLENT MAJESTY,

AND TO

H. R. H. THE PRINCE OF WALES.

"Now for the Laws of England (if I shall speak my opinion of them without "partiality either to my profession or country), for the matter and nature of "them, I hold them wise, just and moderate laws: they give to God, they give to "Cæsar, they give to the subject what appertaineth. It is true they are as mixt "as our language, compounded of British, Saxon, Danish, Norman customs. "And surely as our language is thereby so much the richer, so our laws are like "wise by that mixture the more complete."—LORD BACON.

LONDON:

7, FLEET STREET, E. C.

1871.

INDEX TO CATALOGUE.

Abridgment. Page
Petersdorff 29
Accounts,
Law of. Pulling ... 41
Actions at Law.
Browne 42
Kerr 24
Williams 36
Admiralty,
Practice.
Coote 8
Reports.
Browning & Lushington 46
Lushington ... 46
Robinson ... 46
Swabey ... 46
Aliens. Cutler ... 9
Articled Clerk.
Mosely 15
Attachment,
Foreign, Brandon ... 27
Australia. Torrens ... 41
Banking.
Grant 16
Keyser 41
Bankruptcy,
Robson 8
Manual.
Bulley & Bund ... 13
In County Courts.
Davis 17
Index. Linklater ... 43
Bar.
Law Students' Guide 43
Smith 27
Pearce 42
Barbados. Laws of .. 42
Belligerents.
Hamel 41
Bills of Exchange.
Grant 16
Blackstone.
Stephen's 4
Blockade.
Deane 43
Bookkeeping,
Solicitors. Coombs. 39
Boundaries.
Hunt 23
Brokers.
Keyser 41
Carriers,
Inland. Powell ... 28
Railway. Shelford 6
Chamber Practice.
Com. Law. Parkinson 29
Chancery Practice.
Hunter 23
Drafting Lewis ... 14
Charitable Trusts.
Tudor 31

Page
Church Building.
Trower 40
Civil Law.
Tomkins & Jencken 12
Collieries.
Bainbridge 13
Colonial Law.
Barbados 42
Torrens 41
Commentaries.
Stephen's Blackstone's 4
Common Law,
Practice.
Dixon 12
Lush 12
Kerr 24
Companies.
Grant 40
Shelford 7
Compensation,
Law of.
Ingram 32
Shelford 6
Consolidation Acts.
Shelford 7
Constitution.
May 25
Stephen 4
Contraband of War.
Moseley 27
Deane 43
Contracts,
Specific Performance.
Fry 38
Conveyancing,
Introduction.
Lewis 14
Practice.
Barry 18
Smith 28
Tudor 19
Forms.
Crabb 20
Christie 20
Shelford 20
Rouse 26
Convictions,
Synopsis of. Oke ... 33
Forms. Oke ... 34
Co-operation.
Brabrook 39
Copyholds,
Enfranchisement.
Rouse 10
Law of. Scriven ... 32
Coroner. Baker ... 42
Corporations in General.
Grant 40
Costs,
Law of. Gray ... 41

Page
County Courts.
Practice, Davis ... 17
Practice in Equity,
Davis 17
Practice in Admiralty,
Coote 8
Criminal Law.
Davis 28
Oke 33
Curates. Field ... 40
Customs. Hamel ... 41
Deeds.
Tudor 19
Descents.
Fearne 44
Divorce.
Practice.
Browning... ... 19
Reports.
Swabey & Tristram 46
Drainage.
Wilson 44
Woolrych 28
Ecclesiastical.
Confessions.
Badeley 45
Practice.
Coote 41
Judgment.
Bayford 45
Burder *v.* Heath... 44
Long *v.* Cape Town 45
Phillimore ... 45
Hebbert *v.* Purchas 44
Election,
Law.
Davis 17
Warren 43
Committees.
Warren 43
England,
Laws of.
Blackstone ... 4
Francillon ... 43
Stephen 4
English Bar.
Pearce 42
Smith 27
Equity,
County Courts. Davis 17
Doctrine and Practice.
Goldsmith .. 47
Draftsman. Lewis 14
Pleader Drewry ... 36
Suit in. Hunter ... 23
See Chancery.
Evidence,
County Court. Davis 17
Law of. Powell ... 30
Wills. Wigram ... 38
Circumstantial.
Wills 40

Page

Examinations.
Benham's (Preliminary) Guide ... 10
Law Examination Journal 48
Mosely's Articled Clerks' Handy Book 15

Fences. Hunt 23

Fisheries. Oke ... 35

Foreshores. Hunt ... 23
Williams v. Nicholson 44

Forms,
Conveyancing.
Crabb 20
Rouse 26
Magisterial. Oke... 34
Pleading.
Chitty 21
Greening 42
Probate. Chadwick 22

Game Laws. Oke ... 35

Highways. Glen ... 37

House of Lords,
Digest. Clark ... 18
Reports. Clark ... 46
Practice. May ... 25

Indian Penal Code.
Analysis. Cutler & Griffin 24

Indian Statutes, Index.
Field 27

Industrial Societies.
Brabrook 39

International Law.
Deane 43
Hamel 41
Phillimore 15

Jamaica Riot. Williams 45

Joint Stock Companies.
Shelford 7
Accounts. Pulling 41

Jurisprudence.
Law Magazine ... 48
Holland on Form of the Law 27

Justice of Peace. Oke 33

Landlord and Tenant.
Fawcett 5

Lands Clauses Acts.
Ingram 32
Shelford 7

Law Magazine ... 48

Law Student's Mag. 48

Law Studies.
Mosely 15
Smith 27

Leading Cases,
Real Property. Tudor 19

Leases. Crabb 20
Rouse... ... 26

Legacy Duties.
Shelford 29

Page

Libel. Starkie 31

Lights (Window).
Latham 21

Local Government.
Glen 37

Lunacy. Phillips ... 38

Magisterial Law.
Oke 33
Forms. Oke ... 34

Maritime Warfare.
Deane 43
Hamel 41

Masters and Servants.
Davis 16

Masters and Workmen.
Lovesy 13

Mayor's Court Practice.
Brandon 27

Militia Laws. Dwyer 44

Mines and Minerals.
Bainbridge 13

Mortgages.
Fisher 22
Rouse 26

Naturalization. Cutler 9

Negligence. Saunders 11

Pamphlets 45

Parliamentary.
Clifford & Stephens . 25
May 25
Warren 43

Partnership.
Dixon 11
Tudor's Pothier ... 43

Patents. Norman ... 43

Peerage Claims.
Finlason 37

Petty Sessions. Oke. 33

Pleading,
Common Law.
Chitty 21
Greening 42
Williams 36
Equity. Drewry ... 36
Lewis 14

Poor Law,
Orders. Glen ... 34

Precedents,
Conveyancing.
Crabb 20
Rouse 26
Pleading.
Chitty, jun. ... 21

Priority. Fisher ... 22

Private Bills.
Clifford & Stephens . 25
May 25

Prize Law. Lushington 32

Page

Probate,
Practice. Coote ... 9
Forms. Chadwick 22
Duties. Shelford ... 29
Reports.
Swabey & Tristram 46

Provident Societies.
Brabrook 39

Public Health. Glen 37

Railways. Shelford ... 6
Compensation.
Ingram 32

Real Property. Tudor 19
Chart. Fearne ... 44

Referees' Court.
Clifford & Stephens . 25

Registration.
Davis... 17
Warren 43

Religious,
Confessions. Badeley 45
Doctrine.
Burder *v.* Heath . 44
Discipline.
Long *v.* Cape Town 45
Supremacy of Crown 44

Ritual.
Bayford 45
Hamel 44

Roman Law.
Gaius 24
Ortolan's 6
Tomkins 36
Tomkins & Jencken 12

Settlements, Post-Nuptial. Cutler 42

Sewers. Woolrych ... 28

Sheriff. Sewell ... 44

Sheriff's Court. Davis 17

Short Hand. Gurney 41

Slander. Starkie ... 31

Specific Performance.
Fry 38

Stock Exchange.
Keyser 41

Succession Duty.
Shelford 29

Suit in Equity. Hunter 23

Summary Convictions.
Oke 33

Treaties. Hertslet ... 43

Trusts, Charitable.
Tudor 31

Turnpike Laws. Oke 35

Wills. Crabb 20
Tudor 19
Wigram ... 38

Winding-up. Shelford 7

Window Lights.
Latham 21

STEPHEN'S BLACKSTONE.—Sixth Edition.

MR. SERJEANT STEPHEN'S NEW COMMENTARIES ON THE LAWS OF ENGLAND, partly founded on Blackstone. The Sixth Edition, by JAMES STEPHEN, LL.D., of the Middle Temple, Barrister-at-Law, Registrar in Bankruptcy, late Recorder of Poole, and formerly Professor of English Law at King's College, London. 4 vols. 8vo. 4*l.* 4*s.* cloth.

From the Law Magazine.

"It would be impossible, without entering minutely into details, to notice at any length this most valuable work. It is one which cannot be too highly recommended, not only to the profession but to the general public. It is a great mistake to act upon the notion that the study of the law is a matter of interest to lawyers only. Now there is no work which gives a summary of the English law at once so exhaustive and intelligible to the general reader as this publication of Dr. Stephen. He has incorporated into it all those portions of Blackstone's great work which would at the present day be useful to the reader."

From the Solicitors' Journal.

"This new edition of the well known Stephen's Commentaries deserves a cordial welcome, for few years have been more eventful in legislation than those which have passed since the publication of the fifth edition. The skill with which the new matter is incorporated with the old is particularly remarkable, and in spite of the incongruity of the materials, and the threefold authorship of Blackstone, Serjeant Stephen and the present editor, the result is perfectly homogenous and satisfactory. Indeed the 'noting up' appears to have been done throughout with much ingenuity and industry, and the alterations, great and small, to have been made with excellent judgment. We have no doubt that the work will in its most recent shape retain all its original popularity. Of the 'old wine' of Blackstone there is of course less and less in each successive edition. But in this instance the old wine seems none the worse for having been put into new bottles. We very sincerely recommend this standard text book to all members of the profession. To the student it is simply invaluable, but it is also a useful companion to the most experienced lawyer."

From the Law Examination Reporter.

"Mr. Serjeant Stephen, by his great ability, by his unwearied industry, his simplicity and clearness of diction, has made himself the first tutor to English law students. With a knowledge of the existence of these Commentaries, the student need not ask, with what work am I to commence my legal studies? Here he will find every branch of English law ably treated on. Not only is the work an essential to the beginner, but it will be found of the greatest use at all times, as well after as before call or admission, Any praise on our part of such a work is wholly unnecessary; as we have before remarked, we feel assured we need do nothing more than announce a new edition, to cause an eager demand amongst all law students, and indeed amongst every one wishing to gain an insight into the laws of his country."

From the Law Journal.

"Mr. Sergeant Stephen, more than twenty years ago, conceived the happy thought of introducing the necessary alterations into the text itself; and, as he says in his preface, 'interweave his own composition with it as freely as the purpose of general improvement it might seem to require.' The first edition was favorably received, acknowledged at once as an able reproduction of an invaluable treatise on English law, and has since passed rapidly through successive editions till it has become the acknowledged students' text book, and is accepted by the critics as a standard work. Mr. James Stephen, a no less distinguished and painstaking legal writer than his father, has with equal skill and research superintended the later editions, made the amendments rendered necessary by alterations in the law, and incorporated and commented upon recent statutes, judgments and decisions with as good an arrangement, as bold a grasp, and with as much felicity of style, adapted to and reading smoothly with that portion of Blackstone's text which still remains, as his predecessors in the same path; and the four volumes now published may be safely regarded as a full exposition and a sound authority on English law to the present time."

From the Law Times.

"The popular notion of the study of law is, that it is dry. No person who reads these commentaries will call it so. It is a fascinating book; after six editions it is impossible to say anything new of a standard work like this. The title-page tells its own tale of the confidence of the profession given after many trials of continual improvement by experience and of periodical adaptation to changes as they are made by the legislature and the

Stephen's Commentaries—*continued.*

courts. We can but repeat, that Stephen's Blackstone is indispensable not to the law student alone, but to all who take part in public affairs, and especially to magistrates, who ought to be examined in it before they are permitted to sit upon the bench. Nay, it may be affirmed, that no gentleman can be considered properly educated unless he has acquired so much knowledge of the law of England as is contained in Blackstone noted up by Stephen."

QUESTIONS ON STEPHEN'S BLACKSTONE.

QUESTIONS for LAW STUDENTS on the SIXTH EDITION of Mr. SERJEANT STEPHEN'S NEW COMMENTARIES on the LAWS of ENGLAND. By JAMES STEPHEN, LL.D., of the Middle Temple, Barrister at Law. 8vo. 10*s.* 6*d.* cloth.

FAWCETT'S LAW OF LANDLORD AND TENANT.

A COMPENDIUM of the LAW of LANDLORD and TENANT. By WILLIAM MITCHELL FAWCETT, Esq., of Lincoln's Inn, Barrister at Law. 1 vol. 8vo. 14*s.* cloth.

"This new compendium of the law on a wide and complicated subject, upon which information is constantly required by a vast number of persons, is sure to be in request. It never wanders from the point, and being intended not for students of the law, but for lessors and lessees, and their immediate advisers, wisely avoids historical disquisitions, and uses language as untechnical as the subject admits. It may safely be assumed to contain information on all the ordinary questions which either contracting party may require to be answered."—*Law Journal.*

"A good feature is, that the principles laid down by the judges are given, as far as possible, in their own language, and the essential words of statutes are quoted. The mechanical part of the work has been very well performed. Evidences of the most laborious industry are everywhere to be met with throughout the work. The leading points and cases are presented in one neat, compact and comprehensive volume, the practical utility of which will be apparent at a glance to the professional reader. It is difficult to select a particular portion of a work for special commendation in which we find that so much painstaking industry has been everywhere exhibited. We cordially recommend the work, not only, as we have said, to the professional reader as a really handy book of reference, but also to the owners and occupiers of property generally. Mr. Fawcett deserves the cordial thanks of the profession and the public for this excellent addition to the literature of the subject, and for the pains taken to render his production as complete and as compact as possible."—*Morning Advertiser.*

"A book of considerable practical value, and one likely to be found useful not merely by members of the legal profession, but also by laymen in the character either of landlord or tenant as happen to be interested in land or house property. The book reads both clearly and intelligibly."—*Echo.*

ORTOLAN'S ROMAN LAW, Translated by PRICHARD and NASMITH.

The HISTORY of ROMAN LAW, from the Text of Ortolan's Histoire de la Législation Romaine et Généralisation du Droit (edition of 1870). Translated, with the Author's permission, and Supplemented by a Chronometrical Chart of Roman History. By I. T. PRICHARD, Esq., F.S.S., and DAVID NASMITH, Esq, LL.D., Barristers at Law. 8vo. 28*s. cloth.*

"We know of no work, which, in our opinion, exhibits so perfect a model of what a text-book ought to be. Of the translation before us, it is enough to say, that it is a faithful representation of the original."—*Law Magazine.*

"This translation, from its great merit, deserves a warm reception from all who desire to be acquainted with the history and elements of Roman law, or have its interests as a necessary part of a sound legal education at heart. With regard to that great work, it is enough to say, that English writers have been continually in the habit of doing piecemeal what Messrs. Prichard and Nasmith have done wholesale. Hitherto we have had but gold dust from the mine; now we are fortunate in obtaining a large nugget. Mr. Nasmith is already known as the designer of a chart of the history of England, which has been generally approved, and bids fairly for extensive adoption."—*Law Journal.*

SHELFORD'S RAILWAYS.—Fourth Edition, by Glen.

SHELFORD'S LAW of RAILWAYS, containing the whole of the Statute Law for the Regulation of Railways in England, Scotland and Ireland. With Copious Notes of decided Cases upon the Statutes, Introduction to the Law of Railways and Appendix of Official Documents. Fourth Edition, by W. CUNNINGHAM GLEN, Barrister at Law, Author of the "Law of Highways," "Law of Public Health and Local Government," &c. 2 vols. roy. 8vo. 63*s.* cl.

From the Law Magazine.

"Though we have not had the opportunity of going conscientiously through the whole of this elaborate compilation, we have been able to devote enough time to it to be able to speak in the highest terms of the judgment and ability with which it has been prepared. Its execution quite justifies the reputation which Mr. Glen has already acquired as a legal writer, and proves that no one could have been more properly singled out for the duty he has so well discharged. *The work must take its unquestionable position as the leading Manual of the Railway Law of Great Britain.* . . . . . The cases seem to have been examined, and their effect to be stated with much care and accuracy, and no channel from which information could be gained has been neglected. Mr. Glen, indeed, seems to be saturated with knowledge of his subject. . . . The value of the work is greatly increased by a number of supplemental decisions, which give all the cases up to the time of publication, and by an index which appears to be thoroughly exhaustive."

From the Law Times.

"Mr. Glen has done wisely in preserving that reputation, and, as far as possible, the text of Shelford—though very extensive alterations and additions have been required. But he has a claim of his own. He is a worthy successor of the original author, and possesses much of the same industry, skill in arrangement and astuteness in enumerating the points really decided by cited cases. But we have said enough of a work already so well known. It will have a place not in the library of the lawyer alone. It is a book which every railway office should keep on its shelf for reference."

From the Law Journal.

"Mr. Glen has modestly founded his work as a superstructure on that of Mr. Leonard Shelford, but he has certainly claims to publish it as a purely independent composition. The toil has been as great, and the reward ought to be as complete, as if Mr. Glen had disregarded all his predecessors in the production of treatises on railway law. . . . . Since the year 1864 he has been unceasingly engaged in collecting materials, and though he has been ready for the printer for some time, and has delayed the appearance of the volumes in the expectation of legislative changes in railway law, yet he has expended full five years of care and attention on his work. Let us hope that he will have no cause to think his labour has been in vain. *At any rate we may venture to predict that Mr. Cunningham Glen's edition of Shelford on Railways will be the standard work of our day in that department of law.*"

From the Justice of the Peace.

"Far be it from us to under value Mr. Shelford's labours, or to disparage his merits But we may nevertheless be permitted to observe that *what has hitherto been considered as 'the best work on the subject'* (Shelford), *has been immeasurably improved by the application of Mr. Glen's diligence*

Shelford's Law of Railways—*continued.*

and learning. . . . Sufficient, however, has been done to show that it is in every respect worthy of the reputation which the work has always enjoyed. We feel little doubt that the credit of that work will be greatly increased by Mr. Glen's instrumentality, and that not only will he have ably maintained its reputation by his successful exertions, but that he will have added materially to it."

From the Solicitors' Journal.

"The practitioner will find here collected together all the enactments bearing on every possible subject which may come before him in connection with railways or railway travelling. Whatever questions may arise the lawyer, who has this book upon his shelves, may say to himself, 'If there has been any legislation at all connected with this branch of the subject I shall at once find it in Shelford;' and it needs not to be said that on this account the book will be a very 'comfortable' one to possess. The collection is equally exhaustive in the matter of rules, orders, precedents and documents of official authority. . . . To sum up our review; as a collection of statutes and general information the work will prove extremely useful, because in these respects it is so perfectly exhaustive."

SHELFORD'S JOINT STOCK COMPANIES.—Second Edition by PITCAIRN and LATHAM.

SHELFORD'S LAW of JOINT STOCK COMPANIES, containing a Digest of the Case Law on that subject; the Companies Acts, 1862, 1867, and other Acts relating to Joint Stock Companies; the Orders made under those Acts to regulate Proceedings in the Court of Chancery and County Courts; and Notes of all Cases interpreting the above Acts and Orders. Second Edition, much enlarged, and bringing the Statutes and Cases down to the date of publication. By DAVID PITCAIRN, M.A., Fellow of Magdalen College, Oxford, and of Lincoln's Inn, Barrister at Law, and FRANCIS LAW LATHAM, B.A. Oxon, of the Inner Temple, Barrister at Law, Author of "A Treatise on the Law of Window Lights." 8vo. 21*s.* cloth.

"We may at once state that, in our opinion, the merits of the work are very great, and we confidently expect that it will be, at least for the present, the standard manual of joint stock company law. That great learning and research have been expended by Mr. Pitcairn no one can doubt who reads only a few pages of the book; the result of each case which has any bearing upon the subject under discussion is very lucidly and accurately stated. We heartily congratulate him on the appearance of this work, for which we anticipate a great success. There is hardly any portion of the law at the present day so important as that which relates to joint stock companies, and that this work will be the standard authority on the subject we have not the shadow of a doubt."—*Law Journal.*

"After a careful examination of this work we are bound to say that we know of no other which surpasses it in two all-important attributes of a law book: first, a clear conception on the part of the author of what he intends to do and how he intends to treat his subject; and secondly, a consistent, laborious and intelligent adherence to his proposed order and method. All decisions are noted and epitomised in their proper places, the practice-decisions in the notes to Acts and Rules, and the remainder in the introductory account or digest. In the digest Mr. Pitcairn goes into everything with original research, and nothing seems to escape him. It is enough for us that Mr. Pitcairn's performance is able and exhaustive. Nothing is omitted, and everything is noted at the proper place. In conclusion, we have great pleasure in recommending this edition to the practitioner. Whoever possesses it, and keeps it noted up, will be armed on all parts and points of the law of joint-stock companies."—*Solicitors' Journal.*

"The present work will be found fully to realize what its title-page would lead its readers to expect. It is an elaborate digest of case-law on the subject of Joint Stock Companies, and contains all the other information which is above indicated. Although nominally a second edition of Mr. Shelford's treatise it is in reality an original work; the form and arrangement adopted by Mr. Shelford have been changed, and, we think, improved, by Mr. Pitcairn. A full and accurate index also adds to the value of the work, the merits of which we can have no doubt will be fully recognized by the profession."—*Law Magazine.*

ROBSON'S BANKRUPT LAW.

A TREATISE on the LAW of BANKRUPTCY; containing a full exposition of the Principles and Practice of the Law as altered by the Bankruptcy Act, 1869. With an Appendix of Statutes, Rules, Orders and Forms. By GEORGE YOUNG ROBSON, Esq, of the Inner Temple, Barrister at Law. 8vo. 30s. cloth.

"It is the first attempt which has been made at a complete exposition of the law and practice of bankruptcy as it exists at this moment, that is to say, of the old law of bankruptcy, as modified by the acts of 1869. Mr. Robson is fully justified in publishing at the present time such a book as he has done, and as he is plainly master of the subject and has spared neither time nor labour in the treatment of it, his book is a most useful one. In a very short compass Mr. Robson has given his readers a great mass of useful information. His matter is well selected; his statements of law almost always both accurate and concise."—*Solicitors' Journal.*

"It is an elaborate treatise, which the author tells us he has been preparing for years, and the result of his assiduous labour is a work which calls for warm commendation. We congratulate Mr. Robson in succeeding in a work which demands talent, tact and industry. Mr. Robson's work is especially designed for the use of the profession, and its general utility as an instructive exposition of the law of bankruptcy is merely incidental. This work is a model of handiness and lucidity, and we can appreciate the time and attention it must have cost the author, who has left nothing undone to render his work complete. It is not often that we can accord so much praise to a book; but we are sure that no one who consults Mr. Robson's work will say that our commendation is undeserved."—*Law Journal.*

COOTE'S ADMIRALTY PRACTICE.—Second Edition.

The PRACTICE of the HIGH COURT of ADMIRALTY of ENGLAND: also the Practice of the Judicial Committee of Her Majesty's Most Hon. Privy Council in Admiralty Appeals, with Forms and Bills of Costs. By HENRY CHARLES COOTE, F.S.A., one of the Examiners of the High Court of Admiralty, Author of "The Practice of the Court of Probate," &c. Second Edition, almost entirely re-written; and with a SUPPLEMENT *containing the County Court Practice in Admiralty*, the Act, Rules, Orders, &c. 8vo. 16*s.* cloth.

*** *This work contains every Common Form in use by the Practitioner in Admiralty, as well as every description of Bill of Costs in that Court, a feature possessed by no other work on the Practice in Admiralty.*

"Mr. Coote, being an Examiner of the Court, may be considered as an authoritative exponent of the points of which he treats. His treatise is, substantially considered, everything that can be desired to the practitioner."—*Law Magazine.*

"The book before us is a second and enlarged edition of a work on the Practice of the Admiralty Court written by the author some ten years ago. It is however a great improvement on its predecessor, being much fuller and more systematically arranged, and containing greater facilities for reference. The appendix contains a large number of common forms and precedents of pleadings used in the Court of Admiralty, together with bills of costs. Altogether Mr. Coote has done his work very carefully and completely, and we think his labours will be duly appreciated by Admiralty practitioners."—*Solicitors' Journal.*

"The first edition of this excellent work was produced for the purpose of illustrating the practice of the High Court of Admiralty, just then subordinated to the 'Rules of 1859,' drawn up by the late distinguished judge. Since then several important changes have been carried out, both in the matter of an extended jurisdiction and of practice. These changes it has been Mr. Coote's object to incorporate in the present edition of his work. In addition he has increased the utility of his book by a chapter on the practice of the Judicial Committee of the Privy Council in Admiralty Appeals, and by a copious set of Admiralty precedents, in which it is the author's hope and belief that no necessary common form has been omitted. The present edition appears very seasonably, and will, we doubt not, prove very acceptable to that portion of the legal profession practising in the Court of Admiralty."—*Shipping & Mercantile Gazette.*

"Mr. Coote has the great advantage of experience: he has long been a practitioner in the Court as a proctor; he is consequently familiar with those minutiæ of practice which mark the distinction between the student and the practical man."

"Mr Coote is a successful writer upon the practice of the Probate and the Admiralty Courts. His book on the former has reached a fifth edition, and the volume before us is a second edition."—*Law Times,*

CUTLER'S LAW OF NATURALIZATION.

THE LAW of NATURALIZATION as Amended by the Act of 1870. By JOHN CUTLER, B.A., of Lincoln's Inn, Barrister at Law, Editor of "Powell's Law of Evidence," &c. 12mo. 3*s.* 6*d.* cloth.

"Professor Cutler's book is a useful summary of the law and of the changes which have been made in it. The act is given in full with a useful index."—*Law Magazine.*

"Mr. Cutler, in the work before us, lucidly explains the state of the law previous to the recent statute, and shows the alterations produced by it, so that a careful perusal of his book will enable the reader fully to comprehend the present state of the law upon this most important subject."—*Justice of the Peace.*

"The author's position as Professor of English Law and Jurisprudence is a guarantee of his legal competence, whilst his literary abilities have enabled him to clothe his legal knowledge in language which laymen can understand without being misled by it."—*John Bull.*

COOTE & TRISTRAM'S PROBATE PRACTICE.—6th Edit.

THE PRACTICE of the COURT of PROBATE in Common Form Business. By HENRY CHARLES COOTE, F.S.A., Proctor in Doctors' Commons, &c., &c. Also a Treatise on the Practice of the Court in Contentious Business. By THOMAS H. TRISTRAM, D.C.L., Advocate in Doctors' Commons, and of the Inner Temple. Sixth Edition, with great Additions, and including all the Statutes, Rules, Orders, &c., to the present time; together with a Collection of Original Forms and Bills of Costs. 8vo. 25*s.* cloth.

"Every year the legal arena of probate practice extends itself, and the business, which was, up to the end of the year 1857, a monopoly in the hands of the ancient proctors, has now become the common property of the profession. It is no marvel, then, that the book before us has in twelve years run through five editions, and that the new year of 1871 ushers in the sixth. Neither the authors nor the publishers could care to deny that this substantial success is due in a great measure to the pressing need that has existed for a guide to probate practice; but we may also venture to declare, that the success of the work has been brought about as much by its own intrinsic excellence as by the great demand for a work of the kind. Coote's 'Probate Practice' has been the standard work for twelve years, and we see no reason to doubt that it will maintain its present position for many years to come."—*Law Journal.*

"A book of practice that has arrived at a sixth edition, needs no praise. The fact itself is the best certificate of worth; for practitioners would not have continued to use it if it had not been found entirely adapted for their requirements; of course this has followed the course of all law books, and grown in bulk with each successive edition, as new statutes, new rules of practice and new decisions, accumulate year by year. But the authors have not been content with mere addition, they have performed diligently the no less important work of paring down redundancies and excising the law that has become extinct through subsequent changes. It is *the* book on its subject, and that is the highest praise that can be given to it."—*Law Times.*

"In 1858 Mr. Coote published a first attempt to explain the principles which were to regulate the Common Form Practice of the then new Court of Probate. Very welcome indeed therefore was his opportune book of practice, and its utility has been significantly proved by the fact that we have the sixth edition now before us bound up with Dr. Tristram's Treatise on the Practice of the Court of Probate in Contentious Business."—*Law Magazine.*

ROUSE'S COPYHOLD ENFRANCHISEMENT MANUAL.—Third Edition.

The COPYHOLD ENFRANCHISEMENT MANUAL; enlarged, and treating the subject in the Legal, Practical and Mathematical Points of View; giving numerous Forms, Rules, Tables and Instructions for Calculating the Values of the Lord's Rights; Suggestions to Lords' Stewards, and Copyholders, protective of their several Interests, and to Valuers in performance of their Duties; and including the Act of 1858, and Proceedings in Enfranchisement under it. By ROLLA ROUSE, Esq., of the Middle Temple, Barrister at Law. Third Edition, much enlarged. 12mo. 10*s.* 6*d.* cloth.

"This new edition follows the plan of its predecessor, adopting a fivefold division:—1. The Law. 2. The Practice, with Practical Suggestions to Lords, Stewards and Copyholders. 3. The Mathematical consideration of the Subject in all its Details, with Rules, Tables and Examples. 4. Forms. 5. The Statutes, with Notes. Of these, we can only repeat what we have said before, that they exhaust the subject; they give to the practitioner all the materials required by him to conduct the enfranchisement of a copyhold, whether voluntary or compulsory."—*Law Times.*

"When we consider what favor Mr. Rouse's Practical Man and Practical Conveyancer have found with the profession, we feel sure the legal world will greet with pleasure a new and improved edition of his copyhold manual. The third edition of that work is before us. It is a work of great practical value, suitable to lawyers and laymen. We can freely and heartily recommend this volume to the practitioner, the steward and the copyholder"—*Law Magazine.*

"Now, however, that copyhold tenures are being frequently converted into freeholds, Mr. Rouse's treatise will doubtless be productive of very extensive benefit; for it seems to us to have been very carefully prepared, exceedingly well composed and written, and to indicate much experience in copyhold law on the part of the author."—*Solicitors' Journal.*

BENHAM'S STUDENT'S EXAMINATION GUIDE.

The STUDENT'S GUIDE to the PRELIMINARY EXAMINATION for ATTORNEYS and SOLICITORS, and the Oxford and Cambridge Local Examinations and the College of Preceptors, to which are added numerous Suggestions and Examination Questions selected from those asked at the Law Institution. By JAMES ERLE BENHAM, of King's College, London. 12mo. 3*s.* cloth.

"The book is artistically arranged. It will become a useful guide and instructor, not only to Law Students, but to every Student who is preparing for a preliminary examination."—*Law Journal.*

"Mr. Benham has produced a very useful manual for the aid of intending candidates at the solicitors' preliminary examinations, and the Oxford and Cambridge local examinations. He gives many suggestions on all the subjects of examination and full information thereon."—*Law Examination Reporter.*

"The book is written in a clear and agreeable style, and, in spite of a few blemishes, will no doubt be found useful by the class of readers for whom it is intended."—*Law Magazine and Review.*

"This book is intended for the use of those who are about to undergo the preliminary examinations for attorneys and solicitors and for the Oxford and Cambridge local examinations. The student may learn from Mr. Benham what he has to do and the way to do it. We have no doubt that 'Benham's Student's Examination Guide' will be largely patronised in this examining age."—*Standard.*

SAUNDERS' LAW OF NEGLIGENCE.

A TREATISE on the LAW applicable to NEGLIGENCE. By THOMAS W. SAUNDERS, Esq., Barrister at Law, Recorder of Bath. 1 vol. post 8vo. 9*s*. cloth.

"The book is admirable; while small in bulk, it contains everything that is necessary, and its arrangement is such that one can readily refer to it. Amongst those who have done a good service Mr. Saunders will find a place."—*Law Magazine.*

"We find very considerable diligence displayed. The references to the cases are given much more fully, and on a more rational system than is common with text-book writers. He has a good index."—*Solicitors' Journal.*

"Mr. T. W. Saunders is well known as a large contributor to legal literature, and all his works are distinguished by pains-taking and accuracy. This one is no exception, and the subject, which is of very extensive interest, will ensure for it a cordial welcome from the profession."—*Law Times.*

"The recorder of Bath has rendered good service to the profession, and to the more intelligent section of the general public, by the production of the carefully prepared and practically useful volume now under notice. As a work of reference, the book will be very welcome in the office of the solicitor or in the chambers of the barrister."—*Morning Advertiser.*

"As scarcely a day passes in which claims are not made, and actions brought, for compensations for injuries from neglect of some kind, a short and clear treatise like the present on the law relating to the subject ought to be welcomed It is a moderate size volume, and makes references to all the authorities on the question easy."—*Standard.*

"'Saunders' Law of Negligence' appears to be a careful treatise on a branch of law which is daily acquiring importance, and which is not in so clear a condition as could be wished. The manual before us is a useful treatise."—*Echo.*

"So far as the work goes the author has, we think, accomplished his object. The book is well and carefully written."—*Athenæum.*

DIXON'S LAW OF PARTNERSHIP.

A TREATISE on the LAW OF PARTNERSHIP. By JOSEPH DIXON, of Lincoln's Inn, Esq., Barrister at Law, Editor of "Lush's Common Law Practice." 1 vol. 8vo. 22*s*. cloth.

"Mr. Dixon's manual on the law of partnership will be an acceptable addition to the shelves of our law libraries, whilst from its portable size it will be equally useful as a companion in Court. He has evidently bestowed upon this book the same conscientious labour and painstaking industry for which we had to compliment him some months since when reviewing his edition of 'Lush's Practice of the Superior Courts of Law,' and, as a result, he has produced a clearly written and well-arranged manual upon one of the most important branches of our mercantile law."—*Law Journal.*

"Mr. Dixon has done his work well. The book is carefully and usefully prepared."—*Solicitors' Journal.*

"We heartily recommend to practitioners and students Mr. Dixon's treatise as the best exposition of the law we have read, for the arrangement is not only artistic, but conciseness has been studied without sacrifice of clearness. He sets forth the principles upon which the law is based as well as the cases by which its application is shown. Hence it is something more than a digest, which too many law books are not: it is really an essay."—*Law Times.*

"Mr. Lindley's view of the subject is that of a philosophical lawyer. Mr. Dixon's is purely and exclusively practical from beginning to end. We imagine that very few questions are likely to come before the practitioner which Mr. Dixon's book will not be found to solve. We have only to add, that the value of the book is very materially increased by an excellent marginal summary and a very copious index."—*Law Magazine and Review.*

MR. JUSTICE LUSH'S COMMON LAW PRACTICE. By DIXON.—Third Edition.

LUSH'S PRACTICE of the SUPERIOR COURTS of COMMON LAW at WESTMINSTER, in Actions and Proceedings over which they have a common Jurisdiction: with Introductory Treatises respecting Parties to Actions; Attornies and Town Agents, their Qualifications, Rights, Duties, Privileges and Disabilities; the Mode of Suing, whether in Person or by Attorney, in Formâ Pauperis, &c. &c. &c; and an Appendix, containing the authorised Tables of Costs and Fees, Forms of Proceedings and Writs of Execution. Third Edition. By JOSEPH DIXON, of Lincoln's Inn, Esq., Barrister-at-Law. 2 vols. 8vo. 46*s*. cloth.

"Lush's Practice is what Tidd's Practice was in our days of clerkship, and what Archbold's Practice was in our early professional days—the practice in general use, and the received authority on the subject. It was written by Mr. Lush when he was only a junior rising into fortune and fame. His practical knowledge, his clearness and industry, were even then acknowledged, and his name secured for his work an immediate popularity which experience has confirmed and extended. But the book was in its turn productive of considerable advantage to the author; it largely increased the number of his clients. When new editions were called for, Mr. Lush was too occupied with briefs to find time for the preparation of books; and hence the association of his name with that of Mr. Dixon as editor, and by whom the new edition has been produced. Mr. Dixon reminds us, that twenty-five years have passed since Mr. Lush made his appearance as an author, and vast indeed have been the changes the law has since witnessed. So numerous are they, that the editor has found it the most convenient course to ignore, as it were, the second edition, to take the text of the original work as it came fresh from Mr. Lush's pen, and to mould that to the present practice. He is thus enabled to assure the reader that for every alteration in, or addition to, the text, he alone is responsible. The index is very copious and complete. Under Mr. Dixon's care, Lush's Practice will not merely maintain, it will largely extend, its reputation."—*Law Times.*

"This is an excellent edition of an excellent work. We think that Mr. Dixon has been wise in basing his work on the original edition of the Practice, and not upon the second edition published in the year 1856. He has effected a most successful 'restoration.' As far as the great changes in the law permit, he has re-produced the original work. He has adopted Mr. Lush's arrangement, and only made those alterations and additions which recent legislature has rendered indispensable. The whole work, which contains altogether 1,183 pages, concludes with a copious index entirely re-written and very considerably enlarged. Altogether, both in what he has omitted and what he has added, Mr. Dixon has been guided by sound discretion. We trust that the great and conscientious labours he has undergone will be rewarded. He has striven to make his work 'thorough,' and because he has done so, we take pleasure in heartily recommending it to every member of both branches of the profession."—*Solicitors' Journal.*

"The profession cannot but welcome with the greatest cordiality and pleasure a third edition of their old and much valued friend 'Lush's Practice of the Superior Courts of Law.' Mr. Dixon, in preparing this edition, has gone back to the original work of Mr. Justice Lush, and, as far as the legislative changes and decisions of the last twenty-five years would allow, reproduced it. This adds greatly to the value of this edition, and at the same time speaks volumes for Mr. Dixon's conscientious labour."—*Law Journal.*

TOMKINS AND JENCKEN'S MODERN ROMAN LAW.

COMPENDIUM of the MODERN ROMAN LAW. Founded upon the Treatises of Puchta, Von Vangerow, Arndts, Franz Möhler, and the Corpus Juris Civilis. By FREDERICK J. TOMKINS, Esq., M.A., D.C.L., Author of the "Institutes of Roman Law," Translator of "Gaius," &c, and HENRY DIEDRICH JENCKEN, Esq., Barristers at Law, of Lincoln's Inn. 8vo. 14*s*. cloth.

"Mr. Tomkins and Mr. Jencken could not have written such an excellent book as this if they had not devoted many laborious days, probably years, to the study of the Roman Law in its entirety, and to research into the laws of continental States for the purpose of learning what principles of Roman Law are preserved in their jurisprudence."—*Law Times.*

BAINBRIDGE ON MINES.—Third Edition.

A TREATISE on the LAW of MINES and MINERALS. By WILLIAM BAINBRIDGE, Esq., F.G.S., of the Inner Temple, Barrister at Law. Third Edition, carefully revised, and much enlarged by additional matter relating to Rights of Way and Water and other Mining Easements, the Construction of Leases, Cost Book and General Partnerships, Injuries from Undermining and Inundations, Barriers and Working out of Bounds and Disputes with Workmen. With an Appendix of Forms and Customs, and a Glossary of English Mining Terms. 8vo. 30*s.* cloth.

"After an interval of eleven years we have to welcome a new edition of Mr. Bainbridge's work on Mines and Minerals. It would be entirely superfluous to attempt a general review of a work which has for so long a period occupied the position of the standard work on this important subject. Those only who, by the nature of their practice, have learned to lean upon Mr. Bainbridge as on a solid staff, can appreciate the deep research, the admirable method, and the graceful style of this model treatise. Therefore we are merely reduced to the enquiry, whether the law has, by force of statutes and of judicial decisions, undergone such development, modification or change since the year 1856 as to justify a new edition? That question may be readily answered in the affirmative; and the additions and corrections made in the volume before us furnish ample evidence of the fact. It may be also stated that this book, being priced at 30*s.*, has the exceptional character of being a cheap law publication."—*Law Journal.*

"Mr. Bainbridge was, we believe, the first to collect and publish, in a separate treatise, the Law of Mines and Minerals, and the work was so well done that his volume at once took its place in the law library as the text book on the subject to which it was devoted. This work must be already familiar to all readers whose practice brings them in any manner in connection with mines or mining, and they well know its value. We can only say of this new edition that it is in all respects worthy of its predecessors."—*Law Times.*

LOVESY'S LAW OF MASTERS AND WORKMEN.

(*Dedicated, by permission, to Lord St. Leonards.*)

The LAW of ARBITRATION between MASTERS and WORKMEN, as founded upon the Councils of Conciliation Act of 1867 (30 & 31 Vict. c. 105), the Master and Workmen Act (5 Geo. 4, c. 96), and other Acts, with an Introduction and Notes. By C. W. LOVESY, Esq., of the Middle Temple, Barrister at Law. 12mo. 4*s.* cloth.

"I think you have bestowed much attention upon the later statute, and added some useful notes."—*Lord St. Leonards.*

BULLEY AND BUND'S NEW BANKRUPTCY MANUAL.

A MANUAL of the LAW and PRACTICE of BANKRUPTCY as Amended and Consolidated by the Statutes of 1869: with an APPENDIX containing the Statutes, Orders and Forms. By JOHN F. BULLEY, B.A., and J. W. WILLIS-BUND, M.A., LL.B., Barristers-at-Law. 12mo. 16*s.* cloth. With a Supplement including the Orders to April, 1870.

*** *The Supplement may be had separately*, 1*s. sewed.*

"This is a treatise, not an edition of the acts, and where the law is to a large extent new, this is the best, though the most troublesome, mode of dealing with it. A very complete index makes the work all that the practitioner, be he barrister or solicitor, can require."—*Law Times.*

LEWIS'S INTRODUCTION TO EQUITY DRAFTING.

PRINCIPLES of EQUITY DRAFTING, with an APPENDIX of FORMS. By HUBERT LEWIS, B.A., of the Middle Temple, Barrister-at-Law, Author of "Principles of Conveyancing explained and Illustrated." Post 8vo. 12s. cloth.

*** *This Work, intended to explain the general principles of Equity Drafting, as well as to exemplify Pleadings of the Court of Chancery, will be useful to lawyers resorting to the New Equity Jurisdiction of the County Courts.*

"Practically the rules that apply to the drafting and reading of bills will apply to the composition of the County Court document that will be substituted for the bill. Mr. Lewis's work is therefore likely to have a much wider circle of readers than he could have anticipated when he commenced it, for almost every page will be applicable to County Court Practice, should the bill, in any shape or under any title be retained in the new jurisdiction,—without it we fear that equity in the County Courts will be a mass of uncertainty,—with it every practitioner must learn the art of equity drafting, and he will find no better teacher than Mr. Lewis."—*Law Times.*

"We have little doubt that this work will soon gain a very favourable place in the estimation of the Profession. It is written in a clear and attractive style, and is plainly the result of much thoughtful and conscientious labour."—*Law Magazine and Review.*

LEWIS'S INTRODUCTION TO CONVEYANCING.

PRINCIPLES of CONVEYANCING EXPLAINED and ILLUSTRATED by CONCISE PRECEDENTS. With an Appendix on the Effect of the Transfer of Land Act in Modifying and Shortening Conveyances. By HUBERT LEWIS, B.A., late Scholar of Emman. Coll. Cambridge, of the Middle Temple, Barrister-at-Law. 8vo. 18s. cloth.

"Mr. Lewis is entitled to the credit of having produced a very useful, and, at the same time, original work. This will appear from a mere outline of his plan, which is very ably worked out. The manner in which his dissertations elucidate his subject is clear and practical, and his expositions, with the help of his precedents, have the best of all qualities in such a treatise, being eminently judicious and substantial. Mr. Lewis's work is conceived in the right spirit. Although a learned and goodly volume, it may yet, with perfect propriety, be called a 'handy book' It is besides a courageous attempt at legal improvement; and it is, perhaps by works of such a character that law reform may be best accomplished."—*Law Magazine and Review.*

"By the diligent and painstaking student who has duly mastered the law of property, this work will undoubtedly be hailed as a very comprehensive exponent of the Principles of Conveyancing."—*Legulcian, or Articled Clerks' Magazine.*

"The perusal of the work has given us much pleasure. It shows a thorough knowledge of the various subjects treated of, and is clearly and intelligibly written. Students will now not only be able to become proficient draftsmen, but, by carefully studying Mr. Lewis's dissertations, may obtain an insight into the hitherto neglected Principles of Conveyancing."—*Legal Examiner.*

"On the whole, we consider that the work is deserving of high praise, both for design and execution. It is wholly free from the vice of bookmaking, and indicates considerable reflection and learning. Mr Lewis has at all events succeeded in producing a work to meet an acknowledged want, and we have no doubt he will find many grateful readers amongst more advanced, not less than among younger students."—*Solicitors' Journal and Reporter.*

"Mr. Lewis has contributed a valuable aid to the law student He has condensed the Practice of Conveyancing into a shape that will facilitate its retention on the memory, and his Precedents are usefully arranged as a series of progressive lessons, which may be either used as illustrations or exercises."—*Law Times.*

MOSELY'S ARTICLED CLERKS' HANDY BOOK.

A PRACTICAL HANDY BOOK of ELEMENTARY LAW designed for the use of ARTICLED CLERKS, with a course of Study, and Hints on Reading for the Intermediate and Final Examinations. By M. S. Mosely, Solicitor, Clifford's Inn Prizeman, M. T. 1867. 12mo. 7*s.* cloth.

"Mr. Mosely's little book might be placed with advantage in the hands of students about to enter a solicitor's office. It will tell them many things, simple enough, no doubt, but still things of which in most cases they will be ignorant, and for want of knowing which they might otherwise lose much time; and will afford them useful directions as to a course of reading."—*Solicitors' Journal.*

"To some extent his plan is new, and the novelty consists in this, that he sketches out a course of work and study for each year's pupilage. This plan is no doubt the one Mr. Mosely sketched out for himself when a clerk, and followed up with so much success. To those who really will work from the commencement of their pupilage and carry on their labours steadily and systematically to the end it will be useful."—*Law Examination Reporter.*

"This useful little book is intended for the use of articled clerks during the period of their articles. The style of this book is peculiar; it is an exaggeration of the style adopted by Mr. Haynes in his admirable 'Outlines of Equity.' The author seems to think the adoption of such a style the only way to make the study of the law popular, and we are not prepared to say he is wrong."—*Law Magazine and Review.*

"Both parts are well worked out, and will be found useful; but in the second division of each chapter the law student will find most valuable information, as there Mr. Mosely not only marks out the course of reading which he recommends for each year, but also carefully analyses the contents of each book, and points out those chapters and subjects which it will be most advantageous for the student to master at the first reading, and those which he ought to defer till a second perusal and a wider experience have made him more competent to understand them. The style is remarkably good."—*Irish Law Times.*

PHILLIMORE'S COMMENTARIES ON INTERNATIONAL LAW.

COMMENTARIES on INTERNATIONAL LAW. By the Right Hon. Sir Robert Phillimore, Knt., now Judge of the High Court of Admiralty of England.

*** *Vol.* 1, *second edition, price* 25*s.*, *Vol.* 2, *price* 22*s.*, *Vol.* 3, *price* 32*s.*, *Vol.* 4, *price* 30*s.*, *may be had separately to complete sets, or the work may be had complete in four vols. price* 5*l.* 9*s. cloth.*

Extract from Pamphlet on "American Neutrality," by George Bemis (*Boston, U.S.*). —"Sir Robert Phillimore, the present Queen's Advocate, and author of the most comprehensive and systematic 'Commentaries on International Law' that England has produced."

"The authority of this work is admittedly great, and the learning and ability displayed in its preparation have been recognized by writers on public law both on the Continent of Europe and in the United States. With this necessarily imperfect sketch we must conclude our notice of the first volume of a work which forms an important contribution to the literature of public law. The book is of great utility, and one which should find a place in the library of every civilian."—*Law Magazine.*

"We cordially welcome a new edition of vol. 1. It is a work that ought to be studied by every educated man, and which is of constant use to the public writer and statesman. We wish, indeed, that our public writers would read it more abundantly than they have done, as they would then avoid serious errors in discussing foreign questions. Any general criticism of a book which has been received as a standard work would be superfluous; but we may remark that whilst Sir Robert strictly adheres to the canons of legal authorship, and never gives a statement without an authority or offers a conclusion which is not manifestly deducible from established facts or authoritative utterances, yet so lucid is his style, we had almost said so popular, so clear is the enunciation of principles, so graphic the historical portions that the book may be read with pleasure as well as profit. It will not be out of place to further remark that the arrangement is excellent, the table of contents, the list of authorities are complete, and, therefore, these Commentaries are singularly handy for reference. Altogether this work is a witness to the zeal, industry and ability of Sir R. Phillimore. It will not only be read at home, but also in the United States, and it cannot fail to smooth the way for the thorough international understanding between England and America that the true men of both countries so ardently desire."—*Law Journal.*

GRANT'S LAW OF BANKING.—Second Edition by Fisher.

GRANT'S LAW of BANKERS and BANKING and BANKS of ISSUE, Limited and Chartered, and Winding-up; Directors, Managers and Officers; and the Law as to Cheques, Circular Notes or Letters of Credit, Bank Notes, Exchequer Bills, Coupons, Deposits, &c. (Appendix contains the Bank Notes Issue Bill, and Reasons for Bill, and Official Bank Returns). Second Edition. By R. A. Fisher, Esq., of the Middle Temple, Barrister at Law. 8vo. 21*s.* cloth.

"The present editor has very much increased the value of the original work, a work whose sterling merits had already raised it to the rank of a standard text-book."—*Law Magazine.*

"No man in the profession was more competent to treat the subject of Banking than Mr. Grant. This volume appears opportunely. To all engaged in the litigations, as well as to all legal advisers of bankers, Mr. Grant's work will be an invaluable assistant. It is a clear and careful treatise on a subject not already exhausted, and it must become *the* text-book upon it."—*Law Times.*

"A Second Edition of Mr. Grant's well-known treatise on this branch of the law has been called for and very ably supplied by Mr. Fisher."—*Law Times, Second Notice.*

"The learning and industry which were so conspicuous in Mr. Grant's former work are equally apparent in this. The book supplies a real want, which has long been felt both by the profession and by the public at large."—*Jurist.*

"We commend this work to our readers. This treatise is at once practical and intelligible, and is of use alike to the unprofessional as well as the professional reader. No bank, whether a private concern or a joint-stock company, should be without it."—*Money Market Review.*

DAVIS'S LAW OF MASTER AND SERVANT.

THE MASTER AND SERVANT ACT, 1867: with an Introduction, Notes and Forms, Tables of Offences, and an Index. By James Edward Davis, Esq., Barrister at Law, Stipendiary Magistrate for Stoke-upon-Trent. 12mo. 6*s.* cloth.

"We are glad to see that the question has been treated so ably and carefully as it is in the present volume. Mr. Davis is well fitted to point out the scope and general intentions of the statute, while his experience as stipendiary magistrate of Stoke-upon-Trent render his suggestions as to the practice and procedure to be employed in working out its provisions peculiarly valuable."—*Solicitors' Journal.*

"The task that Mr. Davis undertook in editing this new Master and Servant Act has been well performed, and indeed in a manner that probably no one, who did not enjoy the exceptional advantages for the purpose that Mr. Davis does, could have executed so satisfactorily."—*Irish Law Times.*

"With such a manual before them as that of Mr. Davis, magistrates and practitioners will have little difficulty in fully comprehending the law and knowing how to apply it. We therefore recommend this edition to them."—*Gloucester Journal.*

"The edition of the act which Mr. Davis, the stipendiary magistrate at Stoke-upon-Trent, has just published, will prove of great use as a clue to this legislative labyrinth. In this little work so much of the statutes referred to as is required to make the new law intelligible is quoted at full length; and Mr. Davis has also added sundry tables of matters and things within the jurisdiction of justices under the Master and Servant Act which remedy as far as possible the omissions of the measure itself."—*Saturday Review.*

"This will be found a useful little work for all who have occasion to inquire into master and servant laws as affected by the statute of last session. This book is calculated to be especially serviceable to magistrates and justices of the peace, and they undoubtedly will find it very useful. It is written by one of themselves and is therefore likely to be particularly adapted to their wants."—*Law Journal.*

"He has been enabled to present in this volume a lucid interpretation of the recent act; an interpretation, the necessity for which will be appreciated from the fact that the act of 1867 has been based on a number of statutes to which it refers merely in a schedule. This book summarizes the state of the law before the passing of the act and points out the changes which have been effected thereby."—*Observer.*

DAVIS'S COUNTY COURTS PRACTICE AND EVIDENCE.—Third Edition.

A MANUAL of the PRACTICE and EVIDENCE in ACTIONS and other PROCEEDINGS in the COUNTY COURTS, including the PRACTICE IN BANKRUPTCY, with an Appendix of Statutes and Rules. By JAMES EDWARD DAVIS, of the Middle Temple, Esq., Barrister at Law. Third Edition, considerably enlarged. One thick volume. Royal 12mo. 28*s.* cloth.

*** *This is the only Work on the County Courts which gives Forms of Plaints and treats fully of the Law and Evidence in Actions and other Proceedings in these Courts.*

ALSO

DAVIS'S COUNTY COURTS ACT, 1867.

Royal 12mo. 12*s.* cloth.

AND

DAVIS'S COUNTY COURTS EQUITABLE JURISDICTION ACT, 1865.

Royal 12mo. 5*s.* cloth.

DAVIS'S LAW OF REGISTRATION AND ELECTIONS.

A MANUAL of the LAW of REGISTRATION and ELECTIONS: with a SUPPLEMENT comprising the Cases on Appeal, 1868-1869; the Rules and Cases relating to Election Petitions; the Poor Rate Assessment Act, 1869; and a complete Index to the whole Work. By JAMES EDWARD DAVIS, Esq., Barrister at Law. 12mo. 15*s.* cloth.

*** The SUPPLEMENT may be had separately, price 3*s.* sewed.

"A work which in our judgment is the handiest and most useful of the 'manuals' which the Reform Act of 1867 has brought into existence."—*Law Magazine.*

"We think this the best of the now numerous works on this subject."—*Solicitors' Journal.*

"No one comes forward with better credentials than Mr. Davis, and the book before us seems to possess the qualities essential to a guide to a discharge of their duties by the officials."—*Law Journal.*

"He has done well. In its way, Mr. Davis's work will be exceedingly useful, for it is edited with his usual care, printed in excellent style, and published in a most convenient form."—*Law Times.*

"An able summary of the law of representation."—*Standard.*

"The reputation which Mr. Davis enjoys as an able and conscientious lawyer affords the surest guarantee that the work may be relied on."—*Star.*

CLARK'S DIGEST OF THE HOUSE OF LORDS CASES.

A DIGESTED INDEX to all the REPORTS in the HOUSE of LORDS, from the Commencement of the Series by Dow, in 1814, to the end of the Eleven Volumes of House of Lords Cases; with references to more recent decisions. By CHARLES CLARK, Esq., of the Middle Temple, Barrister, Reporter by Appointment to the House of Lords. 1 vol., royal 8vo. 31*s.* 6*d.* cloth.

"The decisions of the supreme tribunal of this country, however authoritative in themselves, were not, until of late years, at all familiar to the great body of the legal profession, the early reports of them being in the hands of but few persons. In that tribunal, more than in any other, questions can be considered, as they have been, upon purely legal principles, freed from the fetters and obstructions of mere precedent. The acknowledged eminence of the noble and learned persons by whom the decisions have been pronounced, gives them a value beyond their official authoritativeness. It is hoped that this digest will have the effect of making the profession at large familiarly acquainted with them."—*Prefatory Notice.*

BARRY'S PRACTICE OF CONVEYANCING.

A TREATISE on the PRACTICE of CONVEYANCING. By W. WHITTAKER BARRY, Esq., of Lincoln's Inn, Barrister-at-Law, late holder of the Studentship of the Inns of Court, and Author of "The Statutory Jurisdiction of the Court of Chancery." 8vo. 18*s.* cloth.

CONTENTS.

CHAP. I. Abstracts of Title.—CHAP. 2. Agreements.—CHAP. 3. Particulars and Conditions of Sale.—CHAP. 4. Copyholds.—CHAP. 5. Covenants.—CHAP. 6. Creditors' Deeds and Arrangements.—CHAP. 7. Preparation of Deeds.—CHAP. 8. On Evidence.—CHAP. 9. Leases.—CHAP. 10. Mortgages.—CHAP. 11. Partnership Deeds and Arrangements.—CHAP. 12. Sales and Purchases.—CHAP. 13. Settlements.—CHAP. 14. Wills.—CHAP. 15. The Land Registry Act, 25 & 26 Vict. c. 53.—CHAP. 16. The Act for obtaining a Declaration of Title, 25 & 26 Vict. c. 67.—INDEX.

"This treatise supplies a want which has long been felt. There has been no treatise on the practice of conveyancing issued for a long time past that is adequate for the present requirements. Mr. Barry's work is essentially what it professes to be, a treatise on the practice of conveyancing, in which the theoretical rules of real property law are referred to only for the purpose of elucidating the practice. The treatise, although capable of compression, is the production of a person of great merit and still greater promise."—*Solicitors' Journal*

"The author of this valuable treatise on conveyancing has most wisely devoted a considerable part of his work to the practical illustration of the working of the recent Statutes on Registration of Title, and for this as well as for other reasons we feel bound to strongly recommend it to the practitioner as well as the student. The author has proved himself to be a master of the subject, for he not only gives a most valuable supply of practical suggestions, but criticises them with much ability, and we have no doubt that his criticism will meet with general approval."—*Law Magazine.*

"Readers who recal the instruction they gathered from this treatise when published week by week in the pages of the 'Law Times' will be pleased to learn that it has been re-produced in a handsome volume, which will be a welcome addition to the law library. The information that the treatise so much admired may now be had in the more convenient form of a book will suffice of itself to secure a large and eager demand for it."—*Law Times.*

"The work is clearly and agreeably written, and ably elucidates the subject in hand."—*Justice of the Peace.*

"We must content ourselves with the statement that the present is a work of very great ability. There is no modern work which deals with precisely the same subject, and we have no doubt whatever that this will prove a book of very great value both to the practitioner and to the student at law."—*Athenæum.*

TUDOR'S LEADING CASES ON REAL PROPERTY.
Second Edition.

A SELECTION of LEADING CASES on the LAW relating to REAL PROPERTY, CONVEYANCING, and the CONSTRUCTION of WILLS and DEEDS; with Notes. By Owen Davies Tudor, Esq., of the Middle Temple, Barrister at Law, Author of "Leading Cases in Equity." Second Edition. One thick vol., royal 8vo., 42*s.* cloth.

"The Second Edition is now before us, and we are able to say that the same extensive knowledge and the same laborious industry as have been exhibited by Mr. Tudor on former occasions characterize this later production of his legal authorship: and it is enough at this moment to reiterate an opinion that Mr. Tudor has well maintained the high legal reputation which his standard works have achieved in all countries where the English language is spoken, and the decisions of our Courts are quoted."—*Law Magazine and Review.*

"The work before us comprises a digest of decisions which, if not exhaustive of all the principles of our real property code, will at least be found to leave nothing untouched or unelaborated under the numerous legal doctrines to which the cases severally relate. To Mr. Tudor's treatment of all these subjects, so complicated and so varied, we accord our entire commendation. There are no omissions of any important cases relative to the various branches of the law comprised in the work, nor are there any omissions or defects in his statement of the law itself applicable to the cases discussed by him. We cordially recommend the work to the practitioner and student alike, but especially to the former."—*Solicitors' Journal and Reporter.*

"In this new edition, Mr. Tudor has carefully revised his notes in accordance with subsequent decisions that have modified or extended the law as previously expounded. This and the other volumes of Mr. Tudor are almost a law library in themselves, and we are satisfied that the student would learn more law from the careful reading of them, than he would acquire from double the time given to the elaborate treatises which learned professors recommend the student to peruse, with entire forgetfulness that time and brains are limited, and that to do what they advise would be the work of a life."—*Law Times.*

"This well-known work needs no recommendation. Justice, however, to Mr. Tudor requires us to say that familiarity with its pages from its first appearance have convinced us of its value, not only as a repertory of cases, but a judicious summary of the law on the subjects it treats of. So far as we can see, the author has brought down the cases to the latest period, and altogether there have been added about 170 pages of notes in the present edition. As a guide to the present law the book will now be of great value to the lawyer, and it will be especially useful to him when away from a large library."—*Jurist.*

BROWNING'S DIVORCE AND MATRIMONIAL PRACTICE.

THE PRACTICE and PROCEDURE of the COURT for DIVORCE AND MATRIMONIAL CAUSES, including the Acts, Rules, Orders, Copious Notes of Cases and Forms of Practical Proceedings, with Tables of Costs. By W. Ernst Browning, Esq., of the Inner Temple, Barrister-at-law. Post 8vo. 8*s.* cloth.

Mr. Browning's little volume will doubtless become *the* practice of the Divorce Court."—*Law Times.*

"If the future editions are edited with the same care and ability that have been bestowed upon this, it will probably take its place as *the* Practice of the Divorce Court."—*Jurist.*

"He appears to have diligently collated the reported cases, which he states with precision and clearness."—*Solicitors' Journal.*

"A work of very considerable merit and great practical utility, and we have in this work what the lawyer and the practitioner require."—*Law Magazine and Review.*

CHRISTIE'S CRABB'S CONVEYANCING.—Fifth Edition, by Shelford.

CRABB'S COMPLETE SERIES of PRECEDENTS in CONVEYANCING and of COMMON and COMMERCIAL FORMS in Alphabetical Order, adapted to the Present State of the Law and the Practice of Conveyancing; with copious Prefaces, Observations and Notes on the several Deeds. By J. T. CHRISTIE, Esq., Barrister-at-Law. The Fifth Edition, with numerous Corrections and Additions, by LEONARD SHELFORD, Esq., of the Middle Temple, Barrister-at-Law. Two vols. royal 8vo, 3*l.* cloth.

*** *This work, which embraces both the Principles as well as the Practice of Conveyancing, contains likewise every description of Form wanted for Commercial Purposes.*

GENERAL TABLE OF HEADS OF PREFACES AND FORMS.

Abstracts.—Accounts.—Acknowledgments.—Acquittances.—Admittances.—Affidavits, Affirmations or Declarations.—Agreements: to relinquish Business: to Guarantee: for a Lease: before Marriage: for a Partition: between Principal and Agent: for the Sale and Purchase of Estates: for Sale of Copyhold Estates: for Sale of Leaseholds: for Sale of an Advowson.—Annuity: secured on Copyholds.—Annuities: Assignments of.—Appointments: of Guardians.—Apportionment.—Apprenticeship: to the Sea Service: to an Attorney: Assignment of.—Arbitration: Award.—Assignments: Bonds: Leases: Patents: Pews: Policies of Insurance: Reversionary Interests.—Attestations.—Attornments.—Auctions: Particulars of Sale.—Bargains and Sales: of Timber.—Bills of Sale of Goods.—Bonds: Administration: Receiver pending Suit: Post Obit: Stamps on.—Certificates.—Composition: Conveyances in Trust for Creditors.—Conditions: of Sale.—Confirmations.—Consents.—Copartnership: Dissolution of Copartnership.—Covenants: Stamps on: for Production of Title Deeds.—Declarations.—Deeds: I. Nature of Deeds in General: II. Requisites of a Deed: III. Formal parts of Deeds: IV. Where a Deed is necessary or otherwise: V. Construction of Deeds: VI. Avoiding of Deeds: VII. Proof of Deeds: VIII. Admission of Parol Evidence as to Deeds: IX. Possession of Deeds: X. Stamp Duty on Deeds.—Defeasances.—Demises.—Deputation.—Disclaimers.—Disentailing Deeds.—Distress: Notices of.—Dower.—Enfranchisements.—Exchanges.—Feoffments.—Further Charges.—Gifts.—Grants.—Grants of Way or Road.—Indemnities.—Leases: I. Nature of Leases in General: II. Requisites to a Lease: III. Parts of a Lease: IV. Incidents to a Lease: V. Stamps on Leases.—Letters of Credit.—Licences.—Mortgages: of Copyholds: of Leaseholds: Transfer of: Stamp Duty on.—Notes, Orders, Warrants, &c.—Notices: to Quit.—Partition.—Powers: of Attorney.—Presentation.—Purchase Deeds: Conveyance of Copyholds: Assignments of Leaseholds: Stamps on.—Recitals.—Releases or Conveyances: or Discharges.—Renunciations or Disclaimers.—Resignations.—Revocations.—Separation.—Settlements: Stamp Duty on.—Shipping: Bills of Lading: Bills of Sale: Bottomry and Respondentia Bonds: Charter Parties.—Surrenders.—Wills: 1. Definition of Will and Codicil: 2. To what Wills the Act 7 Will. 4 & 1 Vict. c. 26 does not apply: 3. What may be disposed of by Will: 4. Of the capacity of Persons to make Wills: 5. Who may or may not be Devisees: 6. Execution of Wills: 7. Publication of Wills: 8. Revocation of Wills: 9. Lapse of Devises and Bequests: 10. Provisions and Clauses in Wills: 11. Construction of Wills.

"In carefulness we have in him a second Crabb, in erudition Crabb's superior; and the result is a work of which the original author would have been proud, could it have appeared under his own auspices. It is not a book to be quoted, nor indeed could its merits be exhibited by quotation. It is essentially a book of practice, which can only be described in rude outline and dismissed with applause, and a recommendation of it to the notice of those for whose service it has been so laboriously compiled."—*Law Times.*

"Mr. Shelford has proved himself in this task to be not unworthy of his former reputation. To those familiar with his other works it will be a sufficient recommendation of this work that Mr. Shelford's name appears on the title-page; if there be any who are not well acquainted with

Christie's Crabb's Conveyancing—*continued.*

them, we venture to recommend to such the work before us, as the most generally useful and convenient collection of precedents in conveyancing, and of commercial forms for ordinary use, which are to be had in the English language."—*Solicitors' Journal and Reporter.*

"Those who have been in the habit of using Crabb's work will allow that his 'Prefaces' contain practical observations of considerable utility to the professional man. The flow of time carrying with it many changes, and some reforms in the law relative to conveyancing, have imposed the obligation upon Mr. Shelford of carefully revising all, and in many instances has rendered it expedient for him to re-write not a small portion of some of these Prefaces. Mr. Shelford has also had to exercise, and we doubt not with correct judgment has exercised, his discretion as to where he should reject Forms which he deemed it advisable to omit, and where he should revise them or introduce new ones, to meet the modern exigencies and characteristics of conveyancing. To this important part of his duty—the remodelling and perfecting of the Forms—even with the examination which we have already been able to afford this work, we are able to affirm, that the learned editor has been eminently successful and effected valuable improvements."—*Law Magazine and Review.*

"It possesses one distinctive feature in devoting more attention than usual in such works to forms of a commercial nature. We are satisfied from an examination of the present with the immediately preceding edition that Mr. Shelford has very considerably improved the character of the work, both in the prefaces and in the forms. The two volumes contain several hundred pages of additional matter, and both the latest cases and decisions appear to be noticed in the prefaces. Indeed it is evident that Mr. Shelford has modernized the whole work, and thus given it an additional value. On the whole the two volumes of Crabb's Precedents, as edited by Mr. Leonard Shelford, will be found extremely useful in a solicitor's office, presenting a large amount of real property learning, with very numerous precedents: indeed we know of no book so justly entitled to the appellation of 'handy' as the fifth edition of Mr. Crabb's Precedents."—*Law Chronicle.*

CHITTY, Jun., PRECEDENTS IN PLEADING.—3rd Edition.

CHITTY, JUN., PRECEDENTS in PLEADING; with copious Notes on Practice, Pleading and Evidence, by the late JOSEPH CHITTY, Jun., Esq. Third Edition. By the late THOMPSON CHITTY, Esq, and by LEOFRIC TEMPLE, R. G. WILLIAMS, and CHARLES JEFFERY, Esqrs., Barristers at Law. Complete in one vol. royal 8vo. 38*s.* cloth. (Part II. may be had separately, 18*s.* cloth, to complete sets.)

"To enter into detailed criticism and praise of this standard work would be quite out of place. In the present instance the matter has fallen into competent hands, who have spared no pains. This valuable and useful work is brought done to the present time, altered in accordance with the cases and statutes now in force. Great care has been expended by the competent editors, and its usefulness, as heretofore, will be found not to be confined to the chambers of the special pleader, but to be of a more extended character. To those who knew the work of old no recommendation is wanted, to those younger members of the profession who have not that privilege we would suggest that they should at once make its acquaintance."—*Law Journal.*

LATHAM ON THE LAW OF WINDOW LIGHTS.

A TREATISE on the LAW of WINDOW LIGHTS. By FRANCIS LAW LATHAM, of the Inner Temple, Esq., Barrister at Law. Post 8vo. 10*s.* cloth.

"This is not merely a valuable addition to the law library of the practitioner, it is a book that every law student will read with profit. It exhausts the subject of which it treats."—*Law Times.*

"His arrangement is logical and he discusses fully each point of his subject. The work in our opinion is both perspicuous and able, and we cannot but compliment the author on it."—*Law Journal.*

"A treatise on this subject was wanted, and Mr. Latham has succeeded in meeting that want."—*Athenæum.*

CHADWICK'S PROBATE COURT MANUAL.

EXAMPLES of ADMINISTRATION BONDS for the COURT of PROBATE; exhibiting the principle of various Grants of Administration, and the correct mode of preparing the Bonds in respect thereof; also Directions for preparing the Oaths; arranged for practical utility. With Extracts from Statutes; also various Forms of Affirmation prescribed by Acts of Parliament, and a Supplemental Notice, bringing the Work down to 1865. By SAMUEL CHADWICK, of Her Majesty's Court of Probate. Royal 8vo. 12*s.* cloth.

"We undertake to say that the possession of this volume by practitioners will prevent many a hitch and awkward delay, provoking to the lawyer himself and difficult to be satisfactorily explained to the clients."—*Law Magazine and Review.*

"The work is principally designed to save the profession the necessity of obtaining at the registries information as to the preparing or filling up of bonds, and to prevent grants of administration and administration with the will annexed being delayed on account of the defective filling up of such instruments."—*Solicitors' Journal.*

"Mr. Chadwick's volume will be a necessary part of the law library of the practitioner, for he has collected precedents that are in constant requirement. This is purely a book of practice, but therefore the more valuable. It tells the reader what *to do*, and that is the information most required after a lawyer begins to practise."—*Law Times.*

FISHER'S GENERAL LAW OF MORTGAGE.—Second Edit.

The LAW OF MORTGAGE, and other Securities upon Property. By WILLIAM RICHARD FISHER, of Lincoln's Inn, Esq., Barrister at Law. Two vols. Royal 8vo. 55*s.* cloth.

"For a length of time it has been received as the best text book on the law of mortgages, and it has recently received the honour of a second edition. We have never been niggards towards Mr. Fisher's very laborious, learned and useful treatise, and we still see no reason to retract those commendations or to reduce their measure. His book thoroughly deserves the character it has won of being the only good and complete repertory we have of the law of mortgages, and other securities upon property."—*Law Magazine.*

"As the subject-matter of the treatise has been so extended, it is scarcely surprising that the work has swollen from a moderately sized volume in the first edition to two closely printed octavo volumes, comprising, with Appendix and Index, nearly 1,200 pages in the second. But though the work has become larger, it cannot be said to be prolix; on the contrary, the Author's conclusions are laid down clearly and concisely, and are not overloaded with lengthy statement of cases. In fine, the work has evidently been prepared with great care, and cites the later authorities accurately. The new edition of Mr. Fisher's work will be found very useful to the practitioner, and will supply a want that has long been felt."—*Solicitors' Journal.*

"The second edition of this book, comprised in two volumes of royal octavo, has little beyond its paternity to identify it with the original volume which appeared in 1856. If we speak of the author's first essay as merely tentative and meagre and partial, it is only to draw particular attention to the very complete arrangement and copious detail of the edition now before the public. . . These chapters taken together evince that laborious research and accuracy which, more than any other qualification, is required of a text writer, and we doubt not that the excellence of the work will receive its due appreciation at the hands of the profession. A treatise which possesses the essential qualities of accurate learning and lucid arrangement."—*Law Journal.*

"The labour bestowed upon it by Mr. Fisher will be best understood by this fact. The mere list of cases cited in the text fills forty-three pages in double columns, and the list of statutes and orders cited occupies fifteen pages. We conclude by commending this work equally to the practitioner and the student; it will be invaluable to the former for reference, to the latter for reading and digesting."—*Law Times.*

HUNTER'S SUIT IN EQUITY.—Fifth Edition.

AN ELEMENTARY VIEW of the PROCEEDINGS IN A SUIT IN EQUITY. With an Appendix of Forms. By SYLVESTER J. HUNTER, B.A., of Lincoln's Inn, Barrister at Law. Fifth Edition, by G. W. LAWRANCE, M.A., of Lincoln's Inn, Barrister at Law Post 8vo. 10*s.* 6*d.* cloth.

"'Hunter's Suit in Equity' is an excellent book for students. It is really an indispensable for the chauncery part of the lawyer's education. We need hardly describe it again; its serviceableness has made it so well known."—*Solicitors' Journal.*

"Rather more than three years ago we had the pleasure of reviewing, at some length, the fourth edition of this excellent work. The alterations and additions to chancery practice and procedure which have been made during the last three years by statute and by general orders of the court are embodied in their proper places in the present edition. In other respects we need pass no encomiums on the work before us, for its standard merit is too well known to require commendation."—*Law Journal.*

"Changes have compelled the recasting of a considerable portion of Mr. Hunter's excellent outline of the proceedings in a suit in equity, which has become a text-book with the law student. This work has been well done by Mr. Lawrance, who has strictly preserved the scheme of the original sketch, while adapting it to the various changes that have been made. All former editions must be at once exchanged for this one."—*Law Times.*

"As an excellent introduction to the study of chancery practice the book has established its position, and we think the editor has done wisely in merely introducing such amendments as the alteration in the law by statutes and orders requires, and abstaining from any attempt to make it a manual of practice."—*Law Magazine.*

HUNT'S BOUNDARIES, FENCES AND FORESHORES. Second Edition.

A TREATISE on the LAW relating to BOUNDARIES and FENCES, and to the Rights of Property on the Sea Shore and in the Bed of Public Rivers and other Waters. Second Edition. By ARTHUR JOSEPH HUNT, of the Inner Temple, Esq., Barrister at Law. Second Edition. 12mo. 12*s.* cloth.

"There are few more fertile sources of litigation than those dealt with in Mr. Hunt's valuable book. It is sufficient here to say that the volume ought to have a larger circulation than ordinarily belongs to law books, that it ought to be found in every country gentleman's library, that the cases are brought down to the latest date, and that it is carefully prepared, clearly written, and well edited."—*Law Magazine.*

"It speaks well for this book, that it has so soon passed into a second edition. That its utility has been appreciated is shown by its success. Mr. Hunt has availed himself of the opportunity of a second edition to note up all the cases to this time, and to extend considerably some of the chapters, especially that which treats of rights of property on the seashore and the subjects of sea walls and commissions of sewers."—*Law Times.*

"Mr. Hunt chose a good subject for a separate treatise on Boundaries and Fences and Rights to the Seashore, and we are not surprised to find that a second edition of his book has been called for. The present edition contains much new matter. The chapter especially which treats on rights of property on the seashore, which has been greatly extended. Additions have been also made to the chapters relating to the fencing of the property of mine owners and railway companies. All the cases which have been decided since the work first appeared have been introduced in their proper places. Thus it will be seen this new edition has a considerably enhanced value."—*Solicitors' Journal.*

GAIUS' ROMAN LAW.—By Tomkins and Lemon.

(Dedicated by permission to Lord Chancellor Hatherley.)

THE COMMENTARIES of GAIUS on the ROMAN LAW: with an English Translation and Annotations. By FREDERICK J. TOMKINS, Esq., M.A., D.C.L., and WILLIAM GEORGE LEMON, Esq., LL.B., Barristers-at-Law, of Lincoln's Inn. 8vo 27*s.* extra cloth.

"We feel bound to speak in the highest terms of the manner in which Mr. Tomkins and Mr. Lemon have executed their task. We unhesitatingly recommend its careful perusal to all students of Roman Law."—*Law Magazine.*

"The authors have done a good service to the study of Roman Law, and deserve the thanks of those who take an interest in legal literature."—*Solicitors' Journal.*

"The translation is carefully executed and the annotations show extensive knowledge of the Roman Law."—*Athenæum.*

"One of the most valuable contributions from an English source to our legal literature which the last half-century has witnessed."—*Edinburgh Evening Courant.*

KERR'S ACTION AT LAW.—Third Edition.

An ACTION at LAW: being an outline of the JURISDICTION of the SUPERIOR COURTS of COMMON LAW, with an Elementary View of the Proceedings in Actions therein. By ROBERT MALCOLM KERR, LL.D., Barrister at Law; now Judge of the Sheriff's Court of the City of London. The Third Edition. 12mo. 13*s.* cloth.

"There is considerable merit in both works (John William Smith's and Malcolm Kerr's); but the second (Kerr by Bassett Smith) has rather the advantage, in being more recent, and published since the Common Law Procedure Act, 1860."—*Jurist.*

"Mr. Kerr's book is more full and detailed than that of Mr. John William Smith, and is therefore better adapted for those who desire to obtain not merely a general notion but also a practical acquaintance with Common Law Procedure."—*Solicitors' Journal.*

"This is just the book to put into a Student's hand when he enters the legal profession. We have had occasion more than once to recommend it to the notice of our junior brethren."—*Leguleian.*

"Mr. Bassett Smith has proved himself very competent for the office. As a third edition the volume needs no description and permits no criticism. Enough to say that its present appearance will amply sustain the reputation it had already acquired."—*Law Times.*

CUTLER AND GRIFFIN'S INDIAN CRIMINAL LAW.

An ANALYSIS of the INDIAN PENAL CODE, including the INDIAN PENAL CODE AMENDMENT ACT, 1870. By JOHN CUTLER, B A., of Lincoln's Inn, Barrister at Law, Professor of English Law and Jurisprudence, and Professor of Indian Jurisprudence at King's College, London, and EDMUND FULLER GRIFFIN, B.A., of Lincoln's Inn, Barrister at Law. 8vo. 6*s.* cloth.

"It may be added that the Code is just, at present, out of print, so that the production of an analysis at the present moment is especially opportune. Messrs. Cutler and Griffin have produced a useful little book, and produced it at a time when it will be especially useful."—*Solicitors' Journal.*

CLIFFORD & STEPHENS' REFEREES' PRACTICE, 1871.

THE PRACTICE of the COURT of REFEREES on PRIVATE BILLS in PARLIAMENT; with Reports of Cases as to the Locus Standi of Petitioners decided during the Sessions 1867-70. By FREDERICK CLIFFORD, of the Middle Temple, and PEMBROKE S. STEPHENS, of Lincoln's Inn, Esquires, Barristers at Law. Vols. 1 and 2, Part 1. Royal 8vo. 38*s.* cloth.

*** *Vol.* 2, *Part* 1, *containing Cases of the Session* 1870, *separately*, 10*s. sewed.*

"The history and practice of the subject are detailed tersely and accurately, and in a very intelligible manner, in the treatise. To counsel or agents engaged in parliamentary practice the work will prove extremely serviceable."—*Solicitors' Journal.*

"The reports, forming the most important part of the volume, are given with fulness and accuracy, so far as we can judge, and are of themselves a sufficient recommendation to the volume."—*Law Journal.*

"Clifford and Stephens, the authority now universally quoted and relied on in this (Referees') Court."—*Daily News.*

SIR T. ERSKINE MAY'S PARLIAMENTARY PRACTICE. Sixth Edition.

A PRACTICAL TREATISE on the LAW, PRIVILEGES, PROCEEDINGS and USAGE of PARLIAMENT. By Sir THOMAS ERSKINE MAY, K.C.B., of the Middle Temple, Barrister at Law, Clerk of the House of Commons. Sixth Edition, Revised and Enlarged. One very thick vol. 8vo. 35*s.* cloth.

CONTENTS:—Book I. Constitution, Powers and Privileges of Parliament.—Book II. Practice and Proceedings in Parliament.—Book III. The Manner of passing Private Bills, with the Standing Orders in both Houses, and the most recent Precedents.

"The high reputation and the proved practical utility of Sir T. Erskine May's work, render it unnecessary for us to say anything as to its merits. Sir T. Erskine May deserves the best thanks of all who are interested in parliamentary proceedings, for the care and attention he has bestowed in preparing this edition of his valuable work."—*Law Magazine.*

"We hail with satisfaction a new edition of this admirable work. The politician, the lawyer, the parliamentary agent and the educated gentleman, will find here a teacher, a guide, a digest of practice and a pleasing companion. To legal readers the first portion of this work is of the most value. We may advert to the great care with which the author has noted up and incorporated in this new edition all the changes and events of importance since the publication of the fifth edition."—*Law Journal.*

"Six editions in twenty-four years attest the estimation in which this great work is held by the members of successive parliaments, by the promoters of private bills and by constitutional lawyers. It is an exhaustive treatise on that most lawless of all law, the law of parliament. We may point to the words sixth edition upon the title-page as the best possible testimony to its practical value for all who are in any way concerned in the law and practice of parliament."—*Law Times.*

"Perhaps no work has achieved a greater reputation among lawyers than May's 'Parliamentary Practice.' Since the first publication in 1844, a succession of editions have been called for, and now, after an interval of four years since the issue of the fifth, a sixth edition has been found necessary. The work is too well known to need the repetition of any description of its scope."—*Solicitors' Journal.*

"His well-known treatise on the 'Law and Usage of Parliament' at once placed him upon a level with Hatsell, and is now the recognized text-book, not in England only, but in her colonies, and wherever parliamentary government is attempted."—*Times.*

ROUSE'S CONVEYANCER, WITH SUPPLEMENT, 1871.

Third Edition.

The PRACTICAL CONVEYANCER, giving, in a mode combining facility of reference with general utility, upwards of Four Hundred Precedents of Conveyances, Mortgages and Leases, Settlements, and Miscellaneous Forms, with (not in previous Editions) the Law and numerous Outline Forms and Clauses of WILLS and Abstracts of Statutes affecting Real Property, Conveyancing Memoranda, &c. By ROLLA ROUSE, Esq, of the Middle Temple, Barrister at Law, Author of "The Practical Man," &c. Third Edition, greatly enlarged. With a Supplement, giving Abstracts of the Statutory Provisions affecting the Practice in Conveyancing, to the end of 1870; and the requisite Alterations in Forms, with some new Forms; and including a full Abstract in numbered Clauses of the Stamp Act, 1870. Two vols. 8vo. 30*s.* cloth.

*** *The Supplement may be had separately, price* 1*s.* 6*d. sewed.*

"The best test of the value of a book written professedly for practical men is the practical one of the number of editions through which it passes. The fact that this well-known work has now reached its third shows that it is considered by those for whose convenience it was written to fulfill its purpose well."—*Law Magazine.*

"This is the third edition in ten years, a proof that practitioners have used and approved the precedents collected by Mr. Rouse. In this edition, which is greatly enlarged, he has for the first time introduced Precedents of Wills, extending to no less than 116 pages. We can accord unmingled praise to the conveyancing memoranda showing the practical effect of the various statutory provisions in the different parts of a deed. If the two preceding editions have been so well received, the welcome given to this one by the profession will be heartier still."—*Law Times.*

"So far as a careful perusal of Mr. Rouse's book enables us to judge of its merits, we think that as a collection of precedents of general utility in cases of common occurrence it will be found satisfactorily to stand the application of the test. The draftsman will find in the Practical Conveyancer precedents appropriate to all instruments of common occurrence, and the collection appears to be especially well supplied with those which relate to copyhold estates. In order to avoid useless repetition and also to make the precedents as simple as possible, Mr. Rouse has sketched out a number of outline drafts so as to present to the reader a sort of bird's-eye view of each instrument and show him its form at a glance. Each paragraph in these outline forms refers, by distinguishing letters and numbers, to the clauses in full required to be inserted in the respective parts of the instrument, and which are given in a subsequent part of the work, and thus every precedent in outline is made of itself an index to the clauses which are necessary to complete the draft. In order still further to simplify the arrangement of the work, the author has adopted a plan (which seems to us fully to answer its purpose) of giving the variations which may occur in any instrument according to the natural order of its different parts."—*Law Journal.*

"That the work has found favor is proved by the fact of our now having to review a third edition. This method of skeleton precedents appears to us to be attended with important advantages. Space is of course saved, but besides this there is the still more important consideration that the draftsman is materially assisted to a bird's-eye view of his draft. Everyone who has done much conveyancing work knows how thoroughly important, nay, how essential to success, is the formation of a clear idea of the scope and framework of the instrument to be produced. To clerks and other young hands a course of conveyancing under Mr. Rouse's auspices is, we think, calculated to prove very instructive. To the solicitor, especially the country practitioner, who has often to set his clerks to work upon drafts of no particular difficulty to the experienced practitioner, but upon which they the said clerks are not to be quite trusted alone, we think to such gentlemen Mr. Rouse's collection of Precedents is calculated to prove extremely serviceable. We repeat, in conclusion, that solicitors, especially those practising in the country, will find this a useful work."—*Solicitors' Journal.*

HOLLAND ON THE FORM OF THE LAW.

ESSAYS upon the FORM of the LAW. By THOMAS ERSKINE HOLLAND, M.A., Fellow of Exeter College, Oxford, and of Lincoln's Inn, Esq., Barrister at Law, Author of "An Essay upon Composition Deeds," &c. 8vo. 7*s*. 6*d*. cloth.

"A work of great ability."—*Athenæum.*

"Entitled to very high commendation."—*Law Times.*

"The essays of an author so well qualified to write upon the subject."—*Law Journal.*

"We can confidently recommend these essays to our readers."—*Law Magazine.*

"A work in which the whole matter is easily intelligible to the lay as well as the professional public."—*Saturday Review.*

"Mr. Holland's extremely valuable and ingenious essays."—*Spectator.*

FIELD'S TABLE OF, and INDEX TO, INDIAN STATUTES.

CHRONOLOGICAL TABLE OF, and INDEX TO, THE INDIAN STATUTE BOOK from the Year 1834; with a General Introduction to the Statute Law of India. By C. D. FIELD M.A., LL.D., of the Inner Temple, Barrister at Law, and of H.M.', Bengal Civil Service Imperial 4to. 42*s*. cloth.

BRANDON'S MAYOR'S COURT PRACTICE.

EPITOME of the NOTES of PRACTICE of the MAYOR'S COURT of the CITY of LONDON in ORDINARY ACTIONS. By WOODTHORPE BRANDON, Esq., Barrister-at-Law. 8vo. 3*s*. 6*d*. cloth.

BRANDON'S LAW OF FOREIGN ATTACHMENT.

A TREATISE upon the CUSTOMARY LAW of FOREIGN ATTACHMENT, and the PRACTICE of the MAYOR'S COURT of the CITY OF LONDON therein. With Forms of Procedure By WOODTHORPE BRANDON, Esq., of the Middle Temple, Barrister-at-Law. 8vo. 14*s*. cloth.

MOSELEY ON CONTRABAND OF WAR.

WHAT IS CONTRABAND OF WAR AND WHAT IS NOT. A Treatise comprising all the American and English Authorities on the Subject. By JOSEPH MOSELEY, Esq., B.C.L., Barrister at Law. Post 8vo. 5*s*. cloth.

SMITH'S BAR EDUCATION.

A HISTORY of EDUCATION for the ENGLISH BAR, with SUGGESTIONS as to SUBJECTS and METHODS of STUDY. By PHILIP ANSTIE SMITH, Esq., M.A., LL.B., Barrister at Law. 8vo. 9*s*. cloth.

DAVIS'S CRIMINAL LAW CONSOLIDATION ACTS.

THE CRIMINAL LAW CONSOLIDATION ACTS, 1861; with an Introduction and practical Notes, illustrated by a copious reference to Cases decided by the Court of Criminal Appeal. Together with alphabetical Tables of Offences, as well those punishable upon Summary Conviction as upon Indictment, and including the Offences under the New Bankruptcy Act, so arranged as to present at one view the particular Offence, the Old or New Statute upon which it is founded, and the Limits of Punishment; and a full Index. By JAMES EDWARD DAVIS, Esq., Barrister-at-Law. 12mo. 10s. cloth.

POWELL'S LAW OF INLAND CARRIERS.—Second Edition.

THE LAW OF INLAND CARRIERS, especially as regulated by the Railway and Canal Traffic Act, 1854. By EDMUND POWELL, Esq., of Lincoln College, Oxon, M.A., and of the Western Circuit, Barrister at Law. Author of "Principles and Practice of the Law of Evidence." Second Edition, almost re-written. 8vo. 14s. cloth.

"The treatise before us states the law of which it treats ably and clearly, and contains a good index."—*Solicitors' Journal.*

"Mr. Powell's writing is singularly precise and condensed, without being at all dry, as those who have read his admirable Book of Evidence will attest. It will be seen, from our outline of the contents, how exhaustively the subject has been treated, and that it is entitled to be that which it aspires to become, the text book on the law of Carriers."—*Law Times.*

"The subject of this treatise is not indeed a large one, but it has been got up by Mr. Powell with considerable care, and contains ample notice of the most recent cases and authorities."—*Jurist.*

"The two chapters on the Railway and Canal Traffic Act, 1856, are quite new, and the recent cases under the provisions of that statute are analyzed in lucid language."—*Law Magazine.*

WOOLRYCH ON SEWERS.—Third Edition.

A TREATISE on the LAW OF SEWERS, including the Drainage Acts. By HUMPHRY W. WOOLRYCH, Serjeant at Law. Third Edition, with considerable Additions and Alterations. 8vo. 12s. cloth.

"Two editions of it have been speedily exhausted, and a third called for. The author is an accepted authority on all subjects of this class."—*Law Times.*

"This is a third and greatly enlarged edition of a book which has already obtained an established reputation as the most complete discussion of the subject adapted to modern times. Since the treatise of Mr. Serjeant Callis in the early part of the 17th century, no work filling the same place has been added to the literature of the profession. It is a work of no slight labour to digest and arrange this mass of legislation—this task, however, Mr. Serjeant Woolrych has undertaken, and an examination of his book will, we think, convince the most exacting that he has fully succeeded. No one should attempt to meddle with the Law of Sewers without its help."—*Solicitors' Journal.*

SMITH'S PRACTICE OF CONVEYANCING.

An ELEMENTARY VIEW of the PRACTICE of CONVEYANCING in SOLICITORS' OFFICES, with an Outline of the Proceedings under the Transfer of Land and Declaration of Title Acts, 1862, for the use of Articled Clerks. By EDMUND SMITH, B.A., late of Pembroke Coll. Cambridge, Attorney and Solicitor. Post 8vo. 6s. cloth.

PETERSDORFF'S ABRIDGMENT OF THE COMMON LAW. New Edition.

A CONCISE PRACTICAL ABRIDGMENT of the COMMON AND STATUTE LAW, as at present administered in the Common Law, Probate, Divorce and Admiralty Courts, excluding all that is obsolete, overruled or superseded: comprising a Series of Condensed Treatises on the different Branches of the Law, with detailed Directions, Forms and Precedents; an Alphabetical Dictionary of Technical Law Terms and Maxims, and a Collection of Words that have received a Special Judicial Construction; the whole illustrated by References to the principal Cases in Equity, and in the Scotch, American and Irish Reports, and the most eminent text writers. By CHARLES PETERSDORFF, Serjeant-at-Law, assisted by CHARLES W. WOOD, Esq., and WALKER MARSHALL, Esq., Barristers-at-Law. 7 vols. Royal 8vo. With Supplement complete to the year 1870. 8*l.* cloth.

*** *The Supplement may be had separately*, 25*s. cloth.*

SHELFORD'S SUCCESSION, PROBATE and LEGACY DUTIES.—Second Edition.

THE LAW relating to the PROBATE, LEGACY and SUCCESSION DUTIES in ENGLAND, IRELAND and SCOTLAND, including all the Statutes and the Decisions on those Subjects: with Forms and Official Regulations. By LEONARD SHELFORD, Esq., of the Middle Temple, Barrister at Law. The Second Edition, with many Alterations and Additions. 12mo. 16*s.* cloth.

"The treatise before us, one of the most useful and popular of his productions, being now the text book on the subject, nothing remains but to make known its appearance to our readers. Its merits have been already tested by most of them."—*Law Times.*

"Mr. Shelford's book appears to us to be the best and most complete work on this extremely intricate subject."—*Law Magazine.*

PARKINSON'S COMMON LAW CHAMBER PRACTICE.

A HANDY BOOK FOR THE COMMON LAW JUDGES' CHAMBERS. By GEO. H. PARKINSON, Chamber Clerk to the Hon. Mr. Justice Byles. 12mo. 7*s.* cloth.

"For this task Mr. Parkinson is eminently qualified."—*Jurist.*

"It is extremely well calculated for the purpose for which it is intended. So much work is now done in Common Law Chambers by junior clerks that such a little treatise is much wanted. Mr. Parkinson has performed his task skilfully and with care."—*Solicitors' Journal.*

"The practice in Chambers has become sufficiently important to call for a treatise devoted to it, nor could a more competent man for the task have presented himself than Mr. Parkinson, whose great experience as well as intelligence have long placed him in the position of an authority on all matters appertaining to this peculiar but very extensive branch of Common Law Practice."—*Law Times.*

"There is much that would prove very useful to the practitioner in Mr. Parkinson's compilation, and which, so far as we are aware, is not to be found in any other book collected with equal conciseness."—*Law Magazine and Review.*

POWELL ON EVIDENCE.—Third Edit. by Cutler and Griffin.

THE PRINCIPLES and PRACTICE of the LAW of EVIDENCE. By Edmund Powell, M.A., Barrister-at-Law. Third Edition, by John Cutler, B.A., of Lincoln's Inn, Barrister-at Law, Professor of English Law and Jurisprudence, and Professor of Indian Jurisprudence at King's College, London, and Edmund Fuller Griffin, B.A., of Lincoln's Inn, Barrister-at-Law. With a Supplement including the Cases and Statutes to Michaelmas, 1869. 12mo. 16*s.* cloth.

*** *The Supplement may be had separately, price* 1*s. sewed.*

"This is a good edition of a very useful work. The book itself we have always considered as well adapted for the student and convenient for the practitioner. It explains principles clearly and illustrates them without overloading them by the cases quoted. The work is more practical in its object than that of Mr. Best, and treats the subject in a more succinct manner than Mr. Pitt Taylor. There could be no better introduction to the study of the law of evidence than Mr. Powell's book, whilst it is perfectly suitable for ordinary reference; and the care that has been bestowed on it by the present editors will, we think, considerably enhance its value."—*Law Magazine and Review.*

"This is a new edition of a work which we fancy has scarcely been as well known as it deserves. It has not, of course, the pretensions to completeness of Mr. Pitt Taylor's book, nor, possibly, has it so much merit, as an original and scientific treatise as Mr. Best's. At the same time, it is probably more useful than either for ready reference in court on ordinary points. For this purpose Mr. Best's book is of little practical utility, while the two large volumes of Mr. Taylor's work are so cumbrous that probably few practitioners would be likely to take them out of their chambers. The present volume is of a handy size, is moderately cheap, and its contents are remarkably well arranged, so that anything it contains can very rapidly be found. The number of cases to which it refers is considerable, and the effect of the decision seems accurately and concisely given. We think this will be enough to make the work useful to practitioners on circuit, at quarter sessions, and especially in county courts, where access to a library is not usually to be had, and it is inconvenient or impossible to take many or large books. To students and young barristers, also, the book will be useful, not only for reading at home, as more practical than Best and less detailed than Taylor, but also to take with them into court."—*Solicitors' Journal.*

"The treatise before us has with great care and skill incorporated the principles of evidence observed in equity, and also the salient rules adopted in the Anglo-Indian courts. But while we think that the sphere of this treatise must be confined to the education of students, we have no hesitation in asserting that within that sphere the book is a great success, and we cordially recommend the volume to students both for the English bar and for the Indian bar. Its simplicity and perspicuity render it also a valuable aid to members of the Indian civil service."—*Law Journal.*

"We have very great pleasure in noticing this edition of a work with which we have long been familiar. It was certainly a good idea to make the book useful to the equity practitioner. It was a still better idea to adapt the Anglo-Indian rules of evidence, which must assist materially those who are studying in England for the Indian bar, or preparing for the Indian civil service. Mr. Cutler, being Professor of Indian Jurisprudence at King's College, has executed this latter branch of the work with the ability which was to be expected from him, and we can heartily recommend this excellent edition of Mr. Powell's book as likely to prove of very wide utility."—*Law Times.*

"We are glad to see a new edition of Mr. Powell's work on the law of evidence. The present edition is ably edited by Mr. Cutler and Mr. Griffin, who have, in addition to the previous text, added the principles and practice of the law of evidence adopted by the Court of Chancery and other important matter, and brought down the law to the present time. The book will be found a most useful addition to the lawyers' library; and to those practising or about to practice in the county courts it is almost a necessity."—*Law Examination Reporter.*

*** *Although in this work the most important decisions only are quoted, and as a rule but one authority is given for each proposition, yet there are upwards of* 400 *cases cited therein which do not appear in the table of cases prefixed to the latest edition of "Taylor on Evidence."*

STARKIE ON SLANDER AND LIBEL.—Third Edition.

STARKIE'S TREATISE on the LAW of SLANDER and LIBEL; including MALICIOUS PROSECUTIONS, CONTEMPTS of COURT, &c.; also the Pleading and Evidence, Civil and Criminal, with Forms and Precedents. Third Edition. By H. C. FOLKARD, Barrister-at-Law. One thick vol. medium 8vo., 42*s.* cloth.

"Thirty-nine years have gone by and Mr. Folkard has brought out a third edition, and certainly the first glance of the new book gives the impression of pains unspared. In point of bulk it contains more than twice as much matter as the edition of 1830. The criminal division will probably be thought the most valuable portion of the book. The ordinary text books of pleading and evidence go far to help the practitioner on the civil proceedings, but a treatise on criminal proceedings for libels of public mischief was really wanted. With the present volume before them, the law officers of the crown, and lawyers generally, will be saved an infinite amount of labour in search of precedents. No one can say that Mr. Folkard has failed in the full discharge of his onerous duty, and we are sure that he will earn, as he will obtain, the gratitude of the profession."—*Law Journal.*

"In one respect the present edition deserves very high praise. It has been most laboriously executed, and, as far as we have been able to examine, the modern cases, down to the very latest and to the most obscure, have all been collected and have on the whole been accurately set out."—*Solicitors' Journal.*

"It would be difficult to find any part of his subject which Mr. Folkard has not fully investigated, and the result is a valuable addition to the lawyer's library which for many years has been much needed."—*Justice of the Peace.*

"Upon reference to this edition it will be found that Mr. Folkard has performed his task carefully and well. It is well that such a treatise should have been re-edited, and it is well that it should have been edited by so careful and painstaking a man as Mr. Folkard."—*Law Magazine.*

TUDOR'S CHARITABLE TRUSTS.—Second Edition.

THE LAW of CHARITABLE TRUSTS; with the Statutes, including those to 1869, the Orders, Regulations and Instructions issued pursuant thereto, and a Selection of Schemes, with Notes. By OWEN DAVIES TUDOR, Esq., of the Middle Temple, Barrister-at-Law, Author of 'Leading Cases in Equity.' Second Edition, containing all the recent Statutes and Decisions. Post 8vo. 18*s.* cloth.

"Mr. Tudor in the present edition of his work has struck out beyond his original intention, and has made it a complete compendium of the law of charities. No living writer is more capable than Mr. Tudor of producing such a work: his Leading Cases in Equity, and also on the Law of Real Property, have deservedly earned for him the highest reputation as a learned, careful and judicious text-writer. The main feature of the work is the manner in which Mr. Tudor has dealt with all the recent statutes relating to this subject: we have only to add that the index is very carefully compiled."—*Solicitors' Journal.*

"Mr. Tudor's excellent little book on Charitable Trusts. It is indeed no longer a little book but a bulky one of some 650 pages. Mr. Tudor however is a singularly painstaking author; his books, as the profession well knows, are models of industry and care, and hence their popularity. This second edition has collected the cases decided since the issue of the first, and their number is surprising—upwards of one thousand. Mr. Tudor has made his work complete by the introduction of several schemes for the settlement of charities, so that it is in all respects the text-book for the lawyer as well as a hand-book for reference by trustees and others engaged in the management of charities."—*Law Times.*

"The account of the Law of Mortmain and the statutes respecting charitable bequests in their bearing on the different religious orders is full and definite, and the duties of trustees are explained in a clear and straightforward way. Altogether this work must be exceedingly useful, not to say indispensable, to all persons who are connected with charitable trusts, whether as founders, managers or trustees."—*English Churchman.*

"To this second edition large additions are made, and it is now a complete compendium of the Law of Charities."—*Clerical Journal.*

INGRAM'S LAW OF COMPENSATION.—Second Edition.

COMPENSATION TO LAND AND HOUSE OWNERS: being a Treatise on the Law of the Compensation for Interests in Lands, &c. payable by Railway and other Public Companies; with an Appendix of Forms and Statutes. By THOMAS DUNBAR INGRAM, of Lincoln's Inn, Esq., Barrister at Law, now Professor of Jurisprudence and Indian Law in the Presidency College, Calcutta. Second Edition. By J. J. ELMES, of the Inner Temple, Esq., Barrister-at-Law. Post 8vo. 12*s.* cloth.

"Whether for companies taking land or holding it, Mr. Ingram's volume will be a welcome guide. With this in his hand the legal adviser of a company, or of an owner and occupier whose property is taken, and who demands compensation for it, cannot fail to perform his duty rightly."—*Law Times.*

"This work appears to be carefully prepared as regards its matter. This edition is a third larger than the first; it contains twice as many cases, and an enlarged index. It was much called for and doubtless will be found very useful by the practitioner."—*Law Magazine.*

"The appearance upon the title page of the words Second Edition attests in the most conclusive manner that Mr. Ingram has rightly measured the requirements of the profession when he designed the monograph before us. The appendix contains no less than sixty forms required in the practice of this branch of the law and the statutes and parts of statutes in which it is embodied The index is very ample. Thus it will be seen to be a book very valuable to all solicitors who may be concerned for railways or for the persons whose properties are affected by them."—*Law Times, second notice.*

"His explanations are clear and accurate, and he constantly endeavours not only to state the effect of the law which he is enunciating, but also to show the principle upon which it rests."—*Athenæum.*

SCRIVEN ON COPYHOLDS.—Fifth Edition by Stalman.

A TREATISE ON COPYHOLD, CUSTOMARY FREEHOLD, and ANCIENT DEMESNE TENURE, with the Jurisdiction of Courts Baron and Courts Leet. By JOHN SCRIVEN, Serjeant at Law. The Fifth Edition, containing references to Cases and Acts of Parliament to the present time. By HENRY STALMAN, Esq., of the Inner Temple, Barrister-at-Law. Abridged in 1 vol. royal 8vo. 30*s.* cloth.

"No lawyer can see or hear the word 'copyhold' without associating with it the name of Scriven, whose book has been always esteemed not merely the best but the only one of any worth. Until a commutation of the tenure for a fixed rent-charge, after the manner of a tithe commutation, is compelled by the legislature, this treatise will lose none of its usefulness to the solicitors in the country."—*Law Times.*

"It would be wholly superfluous to offer one word of comment on the general body of the work. Scriven on Copyholds has for exactly half a century been not only a standard work but one of unimpeachable authority, and in its pages the present generation has learned all that is known of copyhold and customary tenures. All that is necessary to say is, that in the present edition of Scriven on Copyholds Mr. Stalman has omitted what was useless to retain, and inserted what it was necessary to add. Until copyholds have disappeared utterly, it is at least certain that Scriven on Copyholds by Stalman will hold undisputed sway in the profession."—*Law Journal.*

LUSHINGTON'S NAVAL PRIZE LAW.

A MANUAL of NAVAL PRIZE LAW. By GODFREY LUSHINGTON, of the Inner Temple, Esq., Barrister at Law. Royal 8vo. 10*s.* 6*d.* cloth.

OKE'S MAGISTERIAL SYNOPSIS.—10th Edition.

The MAGISTERIAL SYNOPSIS: a Practical Guide for Magistrates, their Clerks, Attornies, and Constables; Summary Convictions and Indictable Offences, with their Penalties, Punishments, Procedure, &c.; being Alphabetically and Tabularly arranged. By GEORGE C. OKE, Chief Clerk to the Lord Mayor of London. Tenth Edition. 2 vols. 8vo. 58s. cloth.

"The tenth edition of this valuable compendium of magisterial law makes its appearance in two volumes, a great improvement for convenience of reference upon the single bulky volume of the former editions. The position which the work has gained and the growing demand for it are shown by the fact that a ninth edition was published so lately as 1866. In accordance with the suggestion made to Mr. Oke, the present edition has been prepared and issued immediately after the fourth edition of its equally useful companion the Magisterial Formulist. The careful and conscientious treatment which Mr. Oke always bestows upon whatever he takes in hand, entitles him to full credit when he says that 'many titles have been enlarged, much new matter inserted, and a variety of minute improvements made in the references, upon all of which I have bestowed my personal attention and utmost care.'"—*Law Magazine.*

"We are really at a loss to discover any criticism which can fairly be offered on this remarkable work. A new edition every two years is a success such as rarely falls to the lot of the greatest of legal authors, and no one pretends to deny that Mr. Oke has fairly earned his good fortune. The first edition started with 410 pages of matter. Legislation, judicial decisions, and the unwearied research, care and skill of the author, have swelled 410 into 1402 pages, so that he is driven to offer an apology for the bulk of the book and for its compulsory division into two handsome volumes. It would be idle in us to take a survey of the general contents of a work which is familiar to all persons who are concerned in the administration of justice in petty sessions. It is enough to say that Mr. Oke's Synopsis is not only the standard guide to the magisterial bench, but that it is regarded throughout England as the indispensable companion of every justice of the peace."—*Law Journal.*

"Mr. Oke's Synopsis has been for so many years before the public, and its reputation is so fully established, that any elaborate criticism upon the work as a whole would be out of place on the occasion of the publication of a new edition. The functions of magistrates out of quarter sessions and of their clerks and officers are so many and of so very miscellaneous a character that there is perhaps no part of our judicial system in which the services of a reliable and easily accessible guide is so absolutely necessary to all those who have to take any part in the working of the system. To meet this need there are few men who have better reason to know exactly what is necessary than Mr. Oke, and few men better able to supply it; and the success with which he has laboured to this end has been amply attested by the reception which the various editions of his work have met with. But the very nature of the subject with which this work deals renders frequent new editions most important. Not a session passes in which a multitude of new functions are not given to justices, new offences brought within their cognisance, new modes of dealing with old offences prescribed, and these provisions are not to be found in one act where any magistrate might easily find them and master them. They are contained in isolated sections scattered among a multitude of acts on all sorts of subjects, buried often in the most unlikely corner of the statute book, and the statutes of a single session fill more than a thousand goodly octavo pages. These remarks will be appreciated by any one who looks at the addenda of offences made the subject of summary convictions by various acts of the late session of parliament at the end of Mr. Oke's first volume, or at the corresponding addenda to the second volume. This edition incorporates the statute law affecting magistrates since the date of the last edition as well as the decisions of the courts; and whether by good luck or good guidance the publication has been so timed as to enable the author to bring the statute law down to the actual date of issue. The work in its present form is considerably increased in bulk, but it retains its two great merits—completeness and conciseness."—*Solicitors' Journal.*

OKE'S MAGISTERIAL FORMULIST.—Fourth Edition.

The MAGISTERIAL FORMULIST: being a complete collection of Forms and Precedents for practical use in all Cases out of Quarter Sessions, and in Parochial Matters, by Magistrates, their Clerks, Attornies and Constables. By GEORGE C. OKE, Chief Clerk to the Lord Mayor of London, Author of "The Magisterial Synopsis." Fourth Edition. 8vo. 38*s.* cloth.

"What Chitty's 'Archbold' is to the common law practitioner, what Daniell's 'Practice' *was* to Chancery men, what Davidson's 'Precedents' are to conveyancers, such are Mr. Oke's works to those engaged in magisterial duties. Can we use higher praise? If we could we would, because a really genuine book of practice is beyond all price. * * * This, the *third* edition, is destined, we doubt not, to be swallowed up with the same avidity as is usual with this author's publications."—*Law Magazine.*

"The publication of a new edition of this most useful collection of forms has been urgently called for. Mr. Oke's works are so well known to all who are concerned in the administration of magisterial law, that we need say no more than that the present edition seems to have been prepared with his usual care. On a reference to a very full index at the end of the book, we have been unable to detect the omission of any subject in the place where it might be expected to be found, and such forms as the author has had to draw, and not merely to transcribe, appear well executed."—*Solicitors' Journal.*

"Mr. Oke has had many predecessors in his office of Chief Clerk to the Lord Mayor of London of skill, learning and reputation, but it would be impossible to name any one of such officers who has rendered such signal services to the administration of the law by the justices as the author of the book before us. It is indeed difficult to offer any remarks of moment upon a work which has gone through three editions, and has been acknowledged as complete by all who has had occasion to use it. But time alone, and the mass of new legislation which it has brought with it, have made the revision of the book necessary. The important changes and extensions of the law administered by the magistrates since the session of 1861 have justified and demanded a new edition, and in that new edition we believe will be found the same qualities of accuracy and completeness which distinguished its three predecessors. No clerk to justices, and no justice who is anxious to discharge his onerous functions successfully, should be without the 'Magisterial Formulist' and the 'Magisterial Synopsis;' and it need scarcely be added that those members of the profession who are brought in contact with business in petty sessions will derive great assistance from them."—*Law Journal.*

"This work is too well known to need eulogy; it is in universal use in magistrates' courts. It has been out of print for some time, and a new edition was urgently required. We believe that Mr. Oke purposely delayed it that it might be made contemporaneous, or nearly so, with the 'Synopsis.' The contents are brought down to the end of last year, and consequently it includes all the forms required by the new statutes and decisions of the six years that have elapsed since the publication of the third edition. They have been arranged under divers new titles, and especially the modes of describing indictable offences have been much enlarged. It is a book that has been known so long and so extensively, that no further description of it is needed now."—*Law Times.*

GLEN'S POOR LAW ORDERS.—Seventh Edition.

The GENERAL CONSOLIDATED and other ORDERS of the POOR LAW COMMISSIONERS and the POOR LAW BOARD; with explanatory Notes elucidating the Orders, Tables of Statutes, Cases and Index to the Orders and Cases. By W. C. GLEN, Esq., Barrister at Law. Seventh Edition. Post 8vo. 21*s.* cloth.

OKE'S TURNPIKE LAWS.—Second Edition.

The LAWS of TURNPIKE ROADS: comprising the whole of the General Acts; the Acts as to the Union of Trusts, for facilitating Arrangements with their Creditors; the interference of Railways and other Public Works with Roads; their Non-repair, and enforcing Contributions from Parishes, (including also the Acts as to South Wales Turnpike Roads,) &c. &c.; practically arranged, with Cases, Notes, Forms, &c. &c. By GEORGE C. OKE, Author of "The Magisterial Synopsis" and "The Magisterial Formulist," &c. Second Edition. 12mo., 18*s.* cloth.

"In the 'Synopsis' Mr. Oke is unique; the plan was perfectly original, and he has no competitor. In the Turnpike Law he is himself a competitor with others, who had previously possession of the field. Nevertheless, so well has he executed his design that his volume has fairly taken precedence in the esteem of the profession, because he has written it with the same industrious research and painstaking correction which distinguished the 'Synopsis.'"—*Law Times.*

"All Mr. Oke's works are well done, and his 'Turnpike Laws' is an admirable specimen of the class of books required for the guidance of magistrates and legal practitioners in country districts."—*Solicitors' Journal.*

OKE'S GAME AND FISHERY LAWS.—Second Edition.

A HANDY BOOK of the GAME and FISHERY LAWS; containing the whole Law as to Game, Licences and Certificates, Poaching Prevention, Trespass, Rabbits, Deer, Dogs, Birds and Poisoned Grain throughout the United Kingdom, and Private and Salmon Fisheries in England. Systematically arranged, with the Acts, Decisions, Notes, Forms, Suggestions, &c. &c. By GEORGE C. OKE, Author of "*The Magisterial Synopsis*," &c. &c. Second Edition. 12mo. 10*s.* 6*d.* cloth.

"The work is carefully composed, and contains a full index."—*Solicitors' Journal.*

"Care and industry are all that can be shown in such productions, and these qualities are generally shown in the present works. Mr. Oke's book takes a somewhat larger range than Mr. Paterson's, as it embraces the late statute relating to the Salmon Fisheries."—*Athenæum.*

"The plan of Mr. Oke's Handy Book is a very plain and useful one. * * It will be a most acceptable addition to the country gentleman's library, and presents a most intelligible guide to the existing English laws on game and fish, brought down to the present time."—*The Field.*

"To sportsmen, as well as to those magistrates and professional gentlemen who are concerned in the administration of the Game Laws, Mr. Oke's digest and interpretation of the various statutes will prove of great assistance."—*Stamford Mercury.*

"Mr. Oke makes the laws easily comprehended in all their bearings, so that the person requiring information will find it at once, and that in a condensed form. * * It is a work that every sportsman would find useful, now that the season is before him and he is anxious to know how the law stands under the recent acts of parliament."—*Bell's New Messenger.*

"We recommend justices, landlords, and others whom it behoves to be well acquainted with the Game Laws, to supply themselves with a copy of this work; they will find every requisite information in a small space and in an intelligible form."—*Cambridge Chronicle.*

TOMKINS' INSTITUTES OF ROMAN LAW.

THE INSTITUTES of ROMAN LAW. Part I., containing the Sources of the Roman Law and its External History till the Decline of the Eastern and Western Empires. By FREDERICK TOMKINS, M.A., D.C.L., Barrister at Law, of Lincoln's Inn. Royal 8vo. 12*s.* cloth. (To be completed in Three Parts.)

"This work promises to be an important and valuable contribution to the Study of the Roman Law."—*Law Magazine.*

"This work is pronounced by its author to be strictly elementary. But in regard to the labour bestowed, the research exercised, and the materials brought together, it seems to deserve a more ambitious title than that of an elementary treatise. The chapter on Legal Instruction, detailing the systems of legal education pursued in the various epochs of Rome, reflects great credit on the author, and, so far as we know, is purely original, in the sense that no preceding English writer has collated the matter therein contained."—*Law Journal.*

"Dr. Tomkins has chosen his subject wisely in at least one respect, there can be no doubt that a good introductory treatise on the Roman Law is sorely needed at present. The present part is only an instalment. But the present part is unquestionably both valuable in itself and of good promise for the future. We know of no other book in which anything like the same amount of information can be acquired with the same ease. We shall look with great interest for the publication of the remainder of this treatise. If the second part is as well executed as the first, and bears a due proportion to it, we think the work bids fair to become the standard text-book for English students."—*Solicitors' Journal.*

"Of all the works on the Roman Law we believe this will be the best suited to law students. Mr. Tomkins gives us a simple English history of Roman Law, arranged most lucidly with marginal notes and printed in a form calculated for easy reading and retention in the memory. We welcome the book of Mr. Tomkins. It is calculated to promote the study of Roman Law, and both at the universities and in the Inns of Court it is a work which may safely and beneficially be employed as a text-book."—*Law Times.*

DREWRY'S EQUITY PLEADER.

A CONCISE TREATISE on the Principles of EQUITY PLEADING, with Precedents. By C. STEWART DREWRY, Esq., of the Inner Temple, Barrister at Law. 12mo., 6*s.* boards.

CONTENTS:—What Persons are entitled to sue in Equity, and in what manner to sue. —Of the Modes of instituting a Suit in Equity.—Of the Defence of Suits.—Of Pleas. —Of Answers.—Of Amended Bills.—Of Revivor and Supplemental Bills.—Of Interlocutory Applications —Of the Proceedings on going into Evidence.—Of Appeals. —Conclusion.—Appendix of Precedents.

"Mr. Drewry will be remembered by many as the author of the very popular and excellent treatise on the Practice in Equity. He has now contributed to the library of the lawyer another work of equal value, written for younger members of the profession and for students, in which he describes the principles and general rules of Equity Pleading. It will be found of great utility, as introductory to the more elaborate treatises, or to refresh the memory after the study of the larger books."—*Law Times.*

WILLIAMS ON PLEADING AND PRACTICE.

An INTRODUCTION to the PRINCIPLES and PRACTICE of PLEADING in the SUPERIOR COURTS of LAW, embracing an outline of the whole Proceedings in an Action at Law, on Motion, and at Judges' Chambers; together with the Rules of Pleading and Practice, and Forms of all the principal Proceedings. By WATKIN WILLIAMS, M.P., of the Inner Temple, Esq., Barrister at Law. 8vo. 12*s.* cloth.

Mr. Williams has undertaken a work requiring great care in its treatment; but we have no hesitation in saying that he has brought to bear on his task powers of arrangement and clearness of expression of no ordinary character, and has produced a work creditable to himself and useful to the Profession. For the Student especially the book has features of peculiar value, it is at the same time scientific and practical, and throughout the work there is a judicious union of general principles with a practical treatment of the subject, illustrated by forms and examples of the main proceedings."—*Jurist.*

GLEN'S LAW OF HIGHWAYS.—Second Edition.

THE LAW of HIGHWAYS: comprising the Highway Acts 1835, 1862 and 1864: the South Wales Highway Act: the Statutes and Decisions of the Courts on the subject of Highways, Bridges, Ferries, &c., including the Duties of Highway Boards, Surveyors of Highways, the Law of Highways in Local Board of Health Districts; Highways affected by Railways, and Locomotives on Highways. With an Appendix of Statutes in force relating to Highways. By W. CUNNINGHAM GLEN, Esq, Barrister-at-Law. Second Edition. Post 8vo 20*s.* cloth.

"Those who have need of information on the Law as it is, could not resort to a more trustworthy adviser than this Work of Mr. Glen. It is conveniently arranged and capitally, because copiously, indexed."—*Law Times.*

"Mr. Glen undertook a Work that was really required not only by the profession but by a large class of persons interested in the Law of Highways, and Mr. Glen's official position has no doubt qualified him peculiarly to discharge such a task with efficiency. Mr. Glen has succeeded in what he here proposes, and his Treatise will be indispensable to all practitioners interested in the Law of Highways"—*Solicitors' Journal.*

"Altogether we may confidently venture to confirm the statement in the preface, that it may now fairly claim to be recognized as a standard authority on the law of highways by those who are engaged officially or otherwise in the administration of that branch of the law. It is so, as we from personal knowledge can affirm, and, we may add, that it is received by them as a trustworthy guide in the discharge of their onerous duties."—*Law Times (on 2nd Edit).*

"The present edition of Mr. Glen's work contains a great deal of valuable matter which is entirely new. To those interested in the law of highways this manual as it now appears will be found a safe and efficient guide."—*Law Magazine (on 2nd Edition).*

"The general law upon the subject is set forth with a care and lucidity deserving of great praise, and a good index facilitates reference, and renders this work the most complete on this important subject which has yet been published."—*Justice of the Peace.*

"We need say nothing further of this second edition than that we think it likely to maintain fully the reputation obtained by its predecessor. It has the advantages, by no means unworthy of consideration, of being well printed and well indexed, as well as well arranged, and a copious index of statutes renders it a perfect compendium of the authorities bearing in any way on the law of highways."—*Solicitors' Journal on the Second Edition.*

GLEN'S LAW OF PUBLIC HEALTH.—Fifth Edition.

THE LAW RELATING TO PUBLIC HEALTH AND LOCAL GOVERNMENT, including the Law relating to the Removal of Nuisances, Injuries to Health, the Prevention of Diseases, and Sewer Authorities, with the Statutes and Cases. By W. CUNNINGHAM GLEN, of the Middle Temple, Esq., Barrister at Law. 8vo. 30*s.* cloth.

FINLASON ON HEREDITARY DIGNITIES.

A DISSERTATION on the HISTORY of HEREDITARY DIGNITIES; particularly as to their course of Descent and their Forfeiture by Attainder; with Special Reference to the Earldom of Wiltes. By W. F. FINLASON, Esq, Barrister at Law. 8vo. 5*s.* cloth.

"As an inquiry into an important question of peerage law, it cannot fail to have much interest for not a few readers."—*Law Magazine.*

"Mr. Finlason discusses very carefully the modes in which dignities may be forfeited. We heartily recommend it as a pleasant study to laymen and lawyers."—*Law Times.*

WIGRAM ON WILLS.—Fourth Edition.

An EXAMINATION of the RULES of LAW respecting the Admission of EXTRINSIC EVIDENCE in Aid of the INTERPRETATION of WILLS. By the Right Hon. Sir James Wigram, Knt. The Fourth Edition prepared for the press, with the sanction of the learned Author, by W. Knox Wigram, M.A., of Lincoln's Inn, Esq., Barrister at Law. 8vo. 11*s.* cloth.

"In the celebrated treatise of Sir James Wigram, the rules of law are stated, discussed and explained in a manner which has excited the admiration of every judge who has had to consult it."—*Lord Kingsdown, in a Privy Council Judgment, July 8th*, 1858.

"There can be no doubt that the notes of Mr. Knox Wigram have enhanced the value of the work, as affording a ready reference to recent cases on the subjects embraced or arising out of Sir James Wigram's propositions, and which frequently give additional support, and in some instances an extension to the original text."—*Law Chronicle.*

"Understood as general guides, the propositions established by Sir James Wigram's book are of the highest value. But whatever view may be entertained, the book is one which will always be highly prized, and is now presented in a very satisfactory shape, thanks to the industry and intelligence displayed in the notes by the present editor."—*Solicitors' Journal and Reporter.*

FRY'S SPECIFIC PERFORMANCE OF CONTRACTS.

A TREATISE on the SPECIFIC PERFORMANCE of CONTRACTS, including those of Public Companies. By Edward Fry, B.A., of Lincoln's Inn, Esq., Barrister at Law. 8vo. 16*s.* cloth.

"Mr. Fry's work presents in a reasonable compass a large quantity of modern learning on the subject of contracts, with reference to the common remedy by specific performance, and will thus be acceptable to the profession generally."—*Law Chronicle.*

"There is a closeness and clearness in its style, and a latent fulness in the exposition, which not only argue a knowledge of the law, but of those varying circumstances in human society to which the law has to be applied."—*Spectator.*

"Mr. Fry's elaborate essay appears to exhaust the subject, on which he has cited and brought to bear, with great diligence, some 1,500 cases, which include those of the latest reports."—*Law Magazine and Review.*

PHILLIPS'S LAW OF LUNACY.

THE LAW CONCERNING LUNATICS, IDIOTS, and PERSONS of UNSOUND MIND. By Charles P. Phillips, M.A., of Lincoln's Inn, Esq., Barrister at Law, and Secretary to the Commissioners of Lunacy. Post 8vo., 18*s.* cloth.

"Mr. Phillips has, in his very complete, elaborate and useful volume, presented us with an excellent view of the present law, as well as the practice, relating to lunacy."—*Law Magazine and Review.*

BRABROOK'S NEW WORK ON CO-OPERATION.

THE LAW and PRACTICE of CO-OPERATIVE or INDUSTRIAL and PROVIDENT SOCIETIES; including the Winding-up Clauses, to which are added the Law of France on the same subject, and remarks on Trades Unions. By EDWARD W. BRABROOK, F.S.A., of Lincoln's Inn, Esq., Barrister at Law, Assistant-Registrar of Friendly Societies in England. 6*s.* cloth.

"A volume which will be very cordially welcomed by the associations of which it treats and by their legal advisers."—*Law Times.*

"At the present time when so much attention is directed towards the working of Industrial and Provident Societies and Trades Unions, with all their unenviable notoriety, Mr. Brabrook's little work on these societies is opportune, and the statistics and information contained in it are valuable and interesting."—*Law Magazine.*

"The fullness of knowledge is exhibited throughout this practical unpretending and handy little book of information for all whom it concerns."—*Morning Post.*

"The author speaks with practical experience and authority."—*Observer.*

"The little volume is comprehensive and valuable."—*News of the World.*

COOMBS' SOLICITORS' BOOKKEEPING.

A MANUAL of SOLICITORS' BOOKKEEPING: comprising practical exemplifications of a concise and simple plan of Double Entry, with Forms of Account and other books relating to Bills of Costs, Cash, &c., showing their operation, giving directions for keeping, posting and balancing them, and instructions for drawing costs. Adapted for a large or small, sole or partnership business. By W. B. COOMBS, Law Accountant and Costs Draftsman. 1 vol., 8vo. 10*s* 6*d.* cloth.

*** *The various Account Books described in the above work, the Forms of which are Copyright, may be had from the Publishers, at the prices stated in the work at page* 274.

"The author of the above, relying on the well-known fact that solicitors do not like intricate bookkeeping, has presented to that branch of the profession a work in which the really superfluous has been omitted, and that only which is necessary and useful in the ordinary routine in an attorney's office has been retained. He has performed his task in a masterly manner, and in doing so has given the why and the wherefore of the whole system of Solicitors' Bookkeeping. The volume is the most comprehensive we remember to have seen on the subject, and from the clear and intelligible manner in which the whole has been worked out it will render it unexceptionable in the hands of the student and the practitioner."—*Law Magazine.*

"Throughout the *pro formâ* account books most of the different matters of business which usually arise in a solicitor's office have been passed from their commencement to their ultimate conclusion. The bill book contains precedents of bills of costs illustrating the correspondence between that and the disbursement book, and so with the cash book, ledger, and other books; every item has its reference and any intricate points have been explained, which are merits which no other work on the subject possesses; indeed so clear do the instructions appear that a tyro of average skill and abilities with application could under ordinary circumstances open and keep the accounts of a business; and so far as we can judge the author has succeeded in his endeavour to divest solicitors' bookkeeping of complexity, and to be concise and simple without being inefficient. We cannot dismiss this volume without briefly commenting upon the excellent style in which it is submitted to the profession."—*Law Journal.*

"Mr. Coombs' Manual of Solicitors' Bookkeeping in our opinion takes the safe middle course between too great intricacy of management on one side and want of detail and explanation on the other. His system can be equally followed in a small office where a regular accountant is not employed and in an office where the staff is large. Solicitors who manage property will find the specimens of rental accounts given in the appendix very useful."—*Irish Law Times.*

TROWER'S CHURCH BUILDING LAWS.

THE LAW of the BUILDING of CHURCHES, PARSONAGES, and SCHOOLS, and of the Division of Parishes and Places. By CHARLES FRANCIS TROWER, M.A., of the Inner Temple, Esq., Barrister at Law, late Fellow of Exeter College, Oxford, and late Secretary of Presentations to Lord Chancellor Westbury. Post 8vo. 8*s.* cloth.

"A good book on this subject is calculated to be of considerable service both to lawyers, clerics and laymen; and on the whole, after taking a survey of the work before us we may pronounce it a useful work. It contains a great mass of information of essential import to those who as parishioners, legal advisers or clergymen are concerned with glebes, endowments, district chapelries, parishes, ecclesiastical commissions and such like matters, about which the public and notably the clerical public seem to know but little, but which it is needless to say are matters of much importance."—*Solicitors' Journal.*

FIELD'S LAW RELATING TO CURATES.

The LAW RELATING to PROTESTANT CURATES and the RESIDENCE of INCUMBENTS or their BENEFICES in ENGLAND and IRELAND. By C. D. FIELD, M.A, LL.D., late Scholar of Trin. Coll Dublin, and now of Her Majesty's Bengal Civil Service; recently Judge of the Principal Court of Small Causes at Kishnaghur; and Registrar of Her Majesty's High Court of Judicature at Fort William in Bengal; Author of the Law of Evidence in India, &c. Post 8vo. 6*s.* cloth.

"A clear and concise exposition of a branch of the law not often brought under the notice of solicitors, but of considerable interest to the clergy."—*Law Times.*

GRANT'S LAW OF CORPORATIONS IN GENERAL.

A PRACTICAL TREATISE on the LAW of CORPORATIONS in GENERAL, as well Aggregate as Sole; including Municipal Corporations, Railway, Banking, Canal and other Joint-Stock and Trading Bodies, Dean and Chapters, Universities, Colleges, Schools, Hospitals, with *quasi* Corporations aggregate, as Guardians of the Poor, Churchwardens, Churchwardens and Overseers, &c., and also Corporations sole, as Bishops, Deans, Canons, Archdeacons, Parsons, &c. By JAMES GRANT, Esq., of the Middle Temple, Barrister at Law. Royal 8vo. 26*s.* boards.

WILLS ON EVIDENCE.—Fourth Edition.

AN ESSAY on the PRINCIPLES of CIRCUMSTANTIAL EVIDENCE. Illustrated by numerous Cases. By the late WILLIAM WILLS, Esq. Fourth Edition. Edited by his Son, ALFRED WILLS, Esq., Barrister at Law. 8vo. 10*s.* cloth.

Gray's Treatise on the Law of Costs in Actions and other PROCEEDINGS in the Courts of Common Law at Westminster. By JOHN GRAY, Esq., of the Middle Temple, Barrister at Law. 8vo. 21*s.* cloth.

*** This Work embraces the whole modern Law and Practice of Costs, including the important provisions of the Common Law Procedure Act and Rules, 1852, and the recent Statutes affecting the Jurisdiction of the County Courts.

The South Australian System of Conveyancing by Registration of TITLE; with Instructions for the Guidance of Parties Dealing, illustrated by Copies of the Books and Forms in use in the Land Titles Office. By ROBERT R. TORRENS. To which is added the South Australian Real Property Act, as Amended in the Sessions of 1858. With a copious Index. By HENRY GAWLER, Esq, Barrister, Solicitor to the Land Titles Commissioners. 8vo. 4*s.* half cloth.

Pulling's Practical Compendium of the Law and Usage of MERCANTILE ACCOUNTS; describing the various Rules of Law affecting them, the ordinary Mode in which they are entered in Account Books, and the various Forms of Proceeding, and Rules of Pleading, and Evidence for their Investigation, at Common Law, in Equity, Bankruptcy and Insolvency, or by Arbitration. With a SUPPLEMENT, containing the Law of Joint Stock Companies' Accounts, under the Winding-up Acts of 1848 and 1849. By ALEXANDER PULLING, Esq. of the Inner Temple, Barrister at Law. 12mo. 9*s.* boards.

Coote's Practice of the Ecclesiastical Courts, with Forms and Tables of Costs. By HENRY CHARLES COOTE, Proctor in Doctors' Commons, &c. One thick Vol. 8vo. 28*s.* boards.

Hamel's International Law.—International Law in connexion with Municipal Statutes relating to the Commerce, Rights and Liabilities of the Subjects of Neutral States pending Foreign War; considered with reference to the Case of the "Alexandra," seized under the provisions of the Foreign Enlistment Act. By FELIX HARGRAVE HAMEL, of the Inner Temple, Barrister at Law. Post 8vo. 3*s.* sewed.

Keyser on the Law relating to Transactions on the STOCK EXCHANGE. By HENRY KEYSER, Esq., of the Middle Temple, Barrister at Law. 12mo. 8*s.* cloth.

Gurney's System of Short Hand, as used by both Houses of Parliament. Seventeenth Edition, revised and improved. 12mo. 3*s.* 6*d.* cloth.

"Gurney's is, we believe, admitted to be the best of the many systems."—*Law Times.*

A Memoir of Lord Lyndhurst. By William Sidney GIBSON, Esq., M.A., F.S.A, Barrister at Law, of Lincoln's Inn. Second edition, enlarged. 8vo. 2*s.* 6*d.* cloth.

A Memoir of Mr. Justice Talfourd. By a Member of the Oxford Circuit. Reprinted from the Law Magazine. 8vo. 1*s.* sewed.

Memoir of Lord Brougham. By George Harris, F.S.A., Barrister at Law, Author of "Life of Lord Chancellor Hardwicke." Reprinted from the Law Magazine. 8vo. 1*s* 6*d*. sewed.

Cutler's Law of Voluntary and other Settlements, including the 91st section of the Bankruptcy Act, 1869. By JOHN CUTLER, B.A., of Lincoln's Inn, Esq., Barrister at Law. 8vo. 3*s*. cloth.

Civil Service of India—8vo. 1s. sewed. On Reporting CASES for their Periodical Examinations by Selected Candidates for the Civil Service of India. Being a Lecture delivered on Wednesday, June 12, 1867, at King's College, London. By JOHN CUTLER, B.A., of Lincoln's Inn, Barrister at Law, Professor of English Law and Jurisprudence, and Professor of Indian Jurisprudence at King's College, London.

Blayney's Practical Treatise on Life Assurance. Second Edition. By FREDERIC BLAYNEY, Esq. 12mo. 7*s*. boards.

The Laws of Barbados. (By Authority.) Royal 8vo. 21*s*. cloth.

Pearce's Guide to the Bar and Inns of Court.—A Guide to the Inns of Court and Chancery; with Notices of their Ancient Discipline, Rules, Orders and Customs, Readings: together with the Regulations of the Four Inns of Court as to the Admission of Students, Keeping Terms, Lectures, Examination, Call to the Bar, &c. By ROBERT R. PEARCE, Esq., of Gray's Inn, Barrister at Law. 8vo. 8*s*. cloth.

Baker's Practical Compendium of the Recent Statutes, CASES, and DECISIONS affecting the OFFICE of CORONER, with Precedents of Inquisitions, and Practical Forms. By WILLIAM BAKER, Esq., one of the Coroners for Middlesex. 12mo. 7*s*. cloth.

Greening's Forms of Declarations, Pleadings and other PROCEEDINGS in the Superior Courts of Common Law, with the Common Law Procedure Act, and other Statutes; Table of Officers' Fees; and the New Rules of Practice and Pleading, with Notes. By HENRY GREENING, Esq., Special Pleader. Second Edition. 12mo. 10*s*. 6*d*. boards.

Browne's Practical Treatise on Actions at Law, embracing the subjects of Notice of Action; Limitation of Actions; necessary Parties to and proper Forms of Actions, the Consequence of Mistake therein; and the Law of Costs with reference to Damages. By ROWLAND JAY BROWNE, Esq., of Lincoln's Inn, Special Pleader. 8vo. 16*s*. boards.

Quain and Holroyd's New System of Common Law Pro-CEDURE according to the COMMON LAW PROCEDURE ACT, 1852. By J. R. QUAIN, of the Middle Temple, Barrister at Law, and H. HOLROYD, of the Middle Temple, Special Pleader. 12mo. 7*s*. 6*d*. cloth.

Deane's Law of Blockade, as contained in the Judgments of Dr. Lushington and the Cases on Blockade decided during 1854. By J. P. DEANE, D.C.L., Advocate in Doctors' Commons. 8vo. 10*s.* cl.

Cutler on the International Law of Navigable Rivers. 8vo. 1*s.* 6*d.* sewed.

Linklater's Digest of and Index to the New Bankruptcy Act, and the accompanying Acts of 1869. By JOHN LINKLATER, Solicitor. Second Edition. Imperial 8vo. 3*s.* 6*d.* sewed.

Pothier's Treatise on the Contract of Partnership. Translated from the French, with Notes, by O. D. TUDOR, Esq., Barrister at Law. 8vo. 5*s.* cloth.

Hertslet's Complete Collection of the Treaties and Conventions, and Reciprocal Regulations, at present subsisting between Great Britain and Foreign Powers, and of the Laws, Decrees, and Orders in Council concerning the same, so far as they relate to Commerce and Navigation, Slave Trade, Post Office Communications, Copyright, &c., and to the Privileges and Interests of the Subjects of the High Contracting Parties; compiled from Authentic Documents. By LEWIS HERTSLET, Esq., Librarian and Keeper of the Papers, Foreign Office. Vols. 1 to 11, 8vo. 12*l.* 15*s.* boards.

Norman's Treatise on the Law and Practice relating to LETTERS-PATENT for INVENTIONS. By JOHN PAXTON NORMAN, M.A., of the Inner Temple, Barrister at Law. Post 8vo. 7*s.* 6*d.* cloth.

Francillon's Law Lectures. Second Series. Lectures, ELEMENTARY and FAMILIAR, on ENGLISH LAW. By JAMES FRANCILLON, Esq., County Court Judge. First and Second Series. 8vo., 8*s.* each, cloth.

Warren's Manual of the Parliamentary Election Law of the UNITED KINGDOM. By SAMUEL WARREN, D.C.L., Q.C. One thick volume, royal 12mo. 25*s.* cloth.

Warren's Manual of the Law and Practice of Election COMMITTEES. By SAMUEL WARREN, D.C.L., Q.C. Royal 12mo. 15*s.* cloth.

The Law Student's Guide; containing an Historical Trea-tise on each of the Inns of Court, with their Rules and Customs respecting Admission, Keeping Terms, Call to the Bar, Chambers, &c, Remarks on the Jurisdiction of the Benchers, Observations on the Study of the Law, and other useful Information. By P. B. LEIGH, Esq., of Gray's Inn, Barrister at Law. 12mo. 1827. 6*s.* boards.

Foreshore Rights. Report of Case of Williams *v.* Nicholson for removing Shingle from the Foreshore at Withernsea. Heard 31st May, 1870, at Hull. 8vo. 1*s.* sewed.

A Treatise on the Law of Sheriff, with Practical Forms and Precedents. By RICHARD CLARKE SEWELL, Esq., D.C.L., Barrister at Law, Fellow of Magdalen College, Oxford. 8vo. 1*l.* 1*s.*

Dwyer's Militia Laws and Regulations. A Compendium of the PRINCIPAL LAWS and REGULATIONS relating to the MILITIA of GREAT BRITAIN and IRELAND. By EDWARD DWYER, B.A., of Lincoln's Inn, Esq., Barrister at Law. 12mo. 5*s.* 6*d.*

Drainage of Land: How to procure Outfalls by New Drains, or the Improvement of Existing Drains, in the Lands of an Adjoining Owner, under the Powers contained in Part III. of the Act 24 & 25 Vict., cap. 133, 1861; with Explanations of the Provisions, and Suggestions for the Guidance of Landowners, Occupiers, Land Agents and Surveyors. By J. WM. WILSON, Solicitor.

Fearne's Chart, Historical and Legigraphical, of Landed Property in England, from the time of the Saxons to the present Æra, displaying at one view the Tenures, Modes of Descent and Power of Alienation of Lands in England at all times during that period. On a sheet, colored, 6*s.*; on a roller, 8*s.*

Burder *v.* Heath. Judgment delivered on November 2, 1861, by the Right Honorable STEPHEN LUSHINGTON, D.C.L., Dean of the Arches. Folio, 1*s.* sewed.

The Law relating to Ritualism in the United Church of England and Ireland. By F. H. HAMEL, Esq., Barrister at Law. 12mo. 1*s.* sewed.

Archdeacon Hale's Enquiry into the Legal History of the Supremacy of the Crown in Matters of Religion; with especial reference to the Church in the Colonies. With an Appendix. By W. H. HALE, M.A., Archdeacon of London. Royal 8vo. 4*s.* cloth.

Archdeacon Hale's Essay on the Union between Church and STATE, and the Establishment by Law of the Protestant Reformed Religion in England, Ireland and Scotland. By W. H. HALE, M.A., Archdeacon of London. Read at the Visitation of the Clergy, May 14, 1868. 8vo. 1*s.* sewed.

Judgment of the Privy Council in the Case of Hebbert *v.* Purchas. Edited by EDWARD BULLOCK, of the Inner Temple, Barrister at Law. Royal 8vo. 2*s.* 6*d.*

Remarks on the Agitation consequent on the Judgment of the Privy Council in the Case of Hebbert *v.* Purchas. By Canon ROBERTSON, M.A. 8vo. 1*s.* sewed.

Judgment delivered by Right Hon. Lord Cairns on behalf of the Judicial Committee of the Privy Council in the Case of Martin *v.* Mackonochie. Edited by W. ERNST BROWNING, Esq., Barrister at Law. Royal 8vo. 1*s.* 6*d.* sewed.

Judgment of the Right Hon. Sir Robert J. Phillimore, Official Principal of the Court of Arches, with Cases of Martin *v.* Mackonochie and Flamank *v.* Simpson. Edited by WALTER G. F. PHILLIMORE, B.A., of the Middle Temple, &c. Second Edition, Royal 8vo. 2*s.* 6*d.* sewed.

The Judgment of the Dean of the Arches, also the Judgment of the PRIVY COUNCIL, in Liddell (clerk) and Horne and others against Westerton, and Liddell (clerk) and Park and Evans against Beal. Edited by A. F. BAYFORD, LL.D.: and with an elaborate analytical Index to the whole of the Judgments in these Cases. Royal 8vo., 3*s.* 6*d.* sewed.

The Case of Long *v.* **Bishop of Cape Town, embracing the** opinions of the Judges of Colonial Court hitherto unpublished, together with the decision of the Privy Council, and Preliminary Observations by the Editor. Royal 8vo., 6*s.* sewed.

A Letter to the Lord Chancellor concerning Digests and Codes. By WILLIAM RICHARD FISHER, of Lincoln's Inn, Barrister at Law. Royal 8vo., 1*s.* sewed.

The Evils of Unlimited Liability for Accidents of Masters and Railway Companies, especially since Lord Campbell's Act. A Paper read before the Social Science Association. By JOSEPH BROWN, Esq., Q.C. 8vo. 1*s.* sewed.

Legislation on Life Assurance; a Statement of the Principles on which it should proceed. By E. W. BRABROOK, Esq., F.S.A., Barrister at Law, Assistant Registrar of Friendly Societies. 8vo. 6*d.* sewed.

The Amalgamation of the Legal Profession considered with special reference to contemplated Law Reforms. By C. T. SAUNDERS, Attorney at Law. 8vo., 1*s.* sewed.

Jamaica Riot.—The Case of George William Gordon; with Preliminary Observations on the Jamaica Riot of Oct. 11, 1865, and a Preface. By B. T. WILLIAMS, Esq., M. A., Barrister at Law. 8vo. 2*s.* sewed.

The Privilege of Religious Confession in English Courts of Law, considered in a Letter to a Friend. By EDWARD BADELEY, Esq., M.A., Barrister at Law. 8vo. 2*s.*

Our Judicial System. A Speech in the House of Commons, February 22nd, 1867. By SIR ROUNDELL PALMER, Q.C., M.P. 8vo., 1*s.* sewed.

A Plan for the Formal Amendment of the Law of England. By THOMAS ERSKINE HOLLAND, M.A., Barrister at Law. 8vo., 1*s.* sewed.

Imprisonment for Debt and Bankruptcy, with a Suggestion. By a Barrister. 8vo., 6*d.* sewed.

CLARK'S HOUSE OF LORDS REPORTS.

The HOUSE of LORDS CASES on Appeals, Writs of Error and Claims of Peerage. By CHARLES CLARK, Esq., of the Middle Temple, Barrister at Law, Reporter by appointment to the House of Lords.

Complete in Eleven Vols., and containing all the Cases decided from 1847 to 1866.

CLARK'S DIGESTED INDEX to all the HOUSE OF LORDS REPORTS from 1814 to the Present Time.

Royal 8vo. Price 31*s.* 6*d.* cloth.

SWABEY AND TRISTRAM'S PROBATE AND DIVORCE REPORTS.

REPORTS of CASES decided in the COURT of PROBATE and in the COURT for DIVORCE and MATRIMONIAL CAUSES. By Dr. SWABEY, D.C.L., Advocate, and Barrister at Law of Gray's Inn, and Dr. TRISTRAM, D.C.L., Advocate in Doctors' Commons, and of the Inner Temple. Now complete in 4 Vols., containing all the Cases decided, from 1858 to 1866. Price 8*l.* 14*s.* 6*d.* sewed.

DR. ROBINSON'S NEW ADMIRALTY REPORTS.

REPORTS of CASES in the COURT of ADMIRALTY, commencing with the Judgments of the Right Honourable Stephen Lushington, D.C.L. By WILLIAM ROBINSON, D.C.L. Advocate.

Three Vols. containing Cases decided from 1833 to 1850. 4*l.* 7*s.* 6*d.* sewed.

SWABEY'S ADMIRALTY REPORTS.

REPORTS of CASES in the COURT of ADMIRALTY, from 1855 to 1859. By M. C. MERTTINS SWABEY, D.C.L, of Doctors' Commons, and of Gray's Inn, Barrister at Law. Complete in 1 Vol. containing 3 Parts. Price 34*s.* sewed.

VERNON LUSHINGTON'S ADMIRALTY REPORTS.

REPORTS of CASES in the COURT of ADMIRALTY, and on APPEAL to the PRIVY COUNCIL. By VERNON LUSHINGTON, Esq., Barrister at Law. Complete in 1 volume, containing cases from 1859 to 1863.

BROWNING and LUSHINGTON'S ADMIRALTY REPORTS.

REPORTS of CASES in the COURT of ADMIRALTY, and on APPEAL to the PRIVY COUNCIL, 1863—1865. By ERNST BROWNING and VERNON LUSHINGTON, Esqrs., of the Inner Temple, Barristers at Law. Complete in 1 vol. 40*s.* sewed.

PREPARING FOR PUBLICATION.

Goldsmith's Doctrine and Practice of Equity. Sixth Edition. By GEORGE GOLDSMITH, M.A., and HUBERT LEWIS, B.A., Barristers at Law. In post 8vo.

The Institutes of Roman Law. Part II. By FREDERICK J. TOMKINS, Esq., M.A., D.C.L., Barrister at Law, of Lincoln's Inn. To be completed in 3 parts, royal 8vo.

Principles and Rules of the Criminal Law, as expressed and laid down by English Judges; collected and arranged, with Introductory Abstracts and Notes. By PHILIP ANSTIE SMITH, Barrister at Law. Vol. I. (Offences against Property). In 8vo.

A Guide to the Authorities on International Law, consisting of references to the various subjects treated of in the works of popular writers upon the Law of Nations, &c. By EDWARD HERTSLET, of the Foreign Office. In 8vo.

Hamel's Laws of the Customs. Second Edition. 1 vol. Royal 8vo.

A Treatise on the Law of Criminal Procedure. By JAMES EDWARD DAVIS, of the Middle Temple, Esq., Barrister at Law, Stipendiary Magistrate at Stoke-upon-Trent. In 1 vol 8vo.

A Collection of Mortgage Precedents and Decrees; intended as a Companion Work to the General Law of Mortgage. By W. R. FISHER, Esq., of Lincoln's Inn, Barrister at Law. In 1 vol. Royal 8vo.

Hertslet's Commercial Treaties. Vol. XII. By EDWARD HERTSLET, of the Foreign Office.

The Law Magazine and Review for August, 1871.—No. 62.

The Law Examination Journal (Intermediate and Final), for Michaelmas Term, 1871.—No. 9.

The Preliminary Examination Journal.—By JAMES ERLE BENHAM, Author of the "Student's Preliminary Guide." No. 3 for Trinity Term, or July, Examination, 1871. (*To be continued*).

On June 1st, 1871, was published, in 8vo., price One Shilling, by Post 1s. 1d. (to be regularly continued on the morning of the second day after each respective Examination in Hilary, Easter, Trinity and Michaelmas Terms in each year), No. VIII. of The

LAW EXAMINATION JOURNAL

AND

LAW STUDENT'S MAGAZINE.

Edited by M. S. MOSELY, Solicitor and Clifford's Inn Prizeman,
Author of "The Articled Clerks' Handy Book," &c. &c.

CONTENTS OF No. VIII.

I. On the Necessity of providing a Public Prosecutor. By the Editor.—II. How Mr. Mansfield Denman passed his "Final." By E. H.—III. Digest of Cases. Note by the Editor.—IV. Intermediate Examination Questions and Answers, Easter, 1871.—V. Final Examination Questions and Answers, Trinity, 1871.—VI. Correspondence, &c.

On May 17th, 1871, was published, in 8vo., price 1s., by Post 1s. 1d. (to be regularly continued as soon as practicable after each respective Preliminary Examination for Solicitors in February, May, July and November in each year), No. II. of The

Preliminary Examination Journal

AND

STUDENT'S LITERARY MAGAZINE.

Edited by JAMES ERLE BENHAM, formerly of King's College, London,
Author of "The Student's Examination Guide," &c.,
Instructor of Candidates for the Preliminary Examinations for Solicitors; the Preliminary Examinations for the Bar and the Royal College of Surgeons; the Home and Indian Civil Service, &c. &c.

CONTENTS OF No. II.

I, Miscellaneous Notices and Reviews of Educational Works.—II. Lectures on Language.—III. Synopsis of leading Authors, Statesmen, Poets and Philosophers.—IV. The Questions of the Preliminary Examinations held on the 10th and 11th days of May, 1871, with the Answers.—V. Review of the May Examination and remarks on the Study of English History.—VI. Correspondence.

The Law Magazine and Law Review.

(NEW SERIES.)

Published Quarterly, at 5s., in FEBRUARY, MAY, AUGUST and NOVEMBER.

No. 61, published in May, contains:—

I. Estates Tail in India.—II. Lord Brougham's Autobiography.—III. Legal Reporting and Judicial Legislation.—IV. The Law of Fixtures: its Historical development and present state. Part I.—V. The Reform of the Procedure of the English Courts.—VI. Novation of Obligations, according to the Modern Roman Law.—VII. Dicey's Parties to an Action.—VIII. Mr. Dudley Field on the New York Codes.—IX. Justices Procedure (England) Bill.—X. Defects in the Law of Appeal.—XI. Mettray and M. Demetz.—Events, &c.

Imprinted at London,

nvmber Seuen in Flete strete within Temple barre,
whylom the signe of the Hande and starre,
and the Hovse where liued Richard Tottel,
printer by Special patents of the bokes of the Common lawe
in the seueral reigns of
Kng Edw. VI. and of the qvenes Marye and Elizabeth.

Rec'd. 19.11.69
O/N 919